Supreme Court, U.S.
FILED
FEB 11 2004
OFFICE OF THE CLERK

No. 03-031160

IN THE

Supreme Court of the United States

Azel P. Smith, *et al.*,

Petitioners,

v.

City of Jackson, Mississippi, and
Police Department of the City of Jackson, Mississippi.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Pamela S. Karlan
559 Nathan Abbot Way
Stanford, CA 94305

Dennis L. Horn
Horn & Payne, PLLC
P.O. Box 2754
Madison, MS 39130

Thomas C. Goldstein
(Counsel of Record)
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

February 10, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Should this Court grant certiorari to resolve the five-to-three circuit conflict over whether disparate impact claims are cognizable under the Age Discrimination in Employment Act?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the following parties appeared below and are petitioners here: Willie Allen; Joe L. Austin; Jerry Brister; Gloria Burns; Jacqueline Butler; Harvey L. Davis; William H. Gladney, Sr.; Tommie L. Grant; Ned Garner; William R. Gardner; Samuel Haymer; James J. Howard; Warren E. Hull; Thomas Hunter; Arlander Luallen, Jr.; Willie Mack; Eugene McDonald; Carey N. Parkinson; Ruthie Porter; Cleotha Ratliff; John M. Russell; David L. Shaw; Wayne Simpson, Jr.; Richard J. Smith; Kenneth W. Stemmons; James B. Strawbridge; Alphonso Taylor; Miller Weston; and Shirley Williams.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDINGS BELOW ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
RELEVANT STATUTORY PROVISION 1
STATEMENT 2
REASONS FOR GRANTING THE WRIT 5
I. The Courts of Appeals Are Intractably Divided over the Question Presented. 6
II. The Circuit Conflict Is Untenable Given the Importance of the Question Presented. 9
III. This Case Is an Ideal Vehicle to Resolve the Question Presented. 11
IV. The Fifth Circuit's Decision Is Wrong on the Merits. 13
CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Adams v. Ameritech Services, 231 F.3d 414 (CA7 2000), *reh'g and reh'g en banc denied* (Jan. 9, 2001) 8
Adams v. Florida Power Corp., 255 F.3d 1322 (CA11 2001), *cert. granted*, 534 U.S. 1054 (2001), *writ dismissed as improvidently granted*, 535 U.S 228 (2002) 4, 6, 7, 12
Alaska Dep't of Env'tl Conservation v. EPA, __ U.S. __, 72 U.S.L.W. 4133 16
Allen v. Energy Corp., Inc., 193 F.3d 1010 (CA8 1999) 9
Auer v. Robbins, 519 U.S. 452 (1997) 17
Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 16
County of Washington v. Gunther, 452 U.S. 161 (1981).. 5, 15
Dothard v. Rawlinson, 433 U.S. 321 (1977) 11
EEOC v. Francis W. Parker School, 41 F.3d 1073 (CA7 1994), *reh'g and sugg. for reh'g en banc denied* (Nov. 18, 1994), *cert. denied*, 515 U.S. 1142 (1995) 7, 8
EEOC v. Hickman Mills Consolidated School District No. 1, 99 F. Supp. 2d 1070 (W.D. Mo. 2000) 10
EEOC v. Local 350, Plumbers and Pipefitters, 998 F.2d 641 (CA9 1992), *as amended on denial of reh'g and reh'g en banc* (July 6, 1993) 8
EEOC v. McDonnell Douglas Corp., 191 F.3d 948 (CA8 1999) 9
EEOC v. Wyoming, 460 U.S. 226 (1983) 14
Ellis v. United Airlines, Inc., 73 F.3d 999 (CA10 1996), *reh'g-denied* (Feb. 9, 1996), *cert. denied*, 517 U.S. 1245 (1996) 7, 8
Evers v. Alliant Techsystems, Inc., 241 F.3d 948 (CA8 2001) 9

Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419 (CA10 1993) 7
Frank v. United Airlines Inc., 216 F.3d 845 (CA9 2000), *cert. denied*, 532 U.S. 914 (2001) 6, 8
Geller v. Markham, 635 F.2d 1027 (CA2 1980) 6, 12
Griggs v. Duke Power Co., 401 U.S. 424 (1971) ..... passim
Harlston v. McDonnell Douglas Corp., 37 F.3d 379 (CA8 1994) 9
Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) 2, 3, 7
Holt v. Gamewell Corp., 797 F.2d 36 (CA1 1986) 7
Houghton v. SIPCO, Inc., 38 F.3d 953 (CA8 1994) 9
Leftwich v. Harris-Stowe State College, 702 F.2d 686 (CA8 1983) 7, 12
Lewis v. Aerospace Community Credit Union, 114 F.3d 745 (CA8 1997), *reh'g and sugg. for reh'g en banc denied* (July 3, 1997), *cert. denied sub nom. Kelleher v. Aerospace Comty Credit Union*, 523 U.S. 1062 (1998) 6, 8, 9
MacNamara v. Korean Air Lines, 863 F.2d 1135 (CA3 1988), *cert. denied*, 493 U.S. 944 (1989) 7
MacPherson v. Univ. of Montevallo, 922 F.2d 766 (CA11 1991) 7
Maresco v. Evans Chemetics, Div. of W.R. Grace & Co., 964 F.2d 106 (CA2 1992) 7
Markham v. Geller, 451 U.S. 945 (1981) 6
Monroe v. United Airlines, Inc., 736 F.2d 394 (CA7 1984), *cert. denied*, 470 U.S. 1004 (1985) 7
Mullin v. Raytheon Co., 164 F.3d 696 (CA1 1999) 6, 7
Nat'l R.R. Corp. v. Morgan, 536 U.S. 101 (2002) 16
Pulla v. Amoco Oil Co., 72 F.3d 648 (CA8 1996) 9
Skidmore v. Swift & Co., 323 U.S. 134 (1944) 16
Smith v. City of Des Moines, 99 F.3d 1466 (CA8 1996) 7, 9
Smith v. Xerox Corp., 196 F.3d 358 (CA2 1999) 6, 7
Teamsters v. United States, 431 U.S. 324 (1977) 3

Thomas v. First Nat'l Bank of Wynne, 111 F.3d 64 (CA8 1997) 9
Thweatt v. Electronic Data Systems Corp., cert. denied, 124 S. Ct. 922 (2003) 12
Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) 14
Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985) 16
Wooden v. Bd. of Educ. of Jefferson Cty., Ky., 931 F.2d 376 (CA6 1991) 7

Statutes

28 U.S.C. 1254(1). 1
29 U.S.C. 206(d)(1) 5, 15
29 U.S.C. 623(a) 2, 14
29 U.S.C. 623(f) 5, 14
29 U.S.C. 625 15
29 U.S.C. 628 16
29 U.S.C. 631(a) 3
42 U.S.C. 2000e-2(a) 2, 14
42 U.S.C. 2000e-2(k)(1)(A)(i) 12, 15
42 U.S.C. 2000e-12(a) 16

Other Authorities

29 C.F.R. 1625.7(d) 15
46 Fed. Reg. 47,724 (Sept. 29, 1981) 15
Brief in Opposition, No. 03-349, *Thweatt v. Electronic Data Systems Corp.* 13
Executive Order No. 12,106, 44 Fed. Reg. 1053 (Dec. 28, 1978) 15
Oral Argument Transcript, No. 01-584, *Adams v. Florida Power Corp.* 13
Petition for Certiorari, No. 03-349, *Thweatt v. Electronic Data Systems Corp.* 13

U.S. Department of Labor, Bureau of Labor Statistics, *at* http://data.bls.gov/labjava/outside.jsp?survey=ln (last visited Feb. 2, 2004) 9

PETITION FOR A WRIT OF CERTIORARI

Petitioners Azel P. Smith, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-38a) is published at 351 F.3d 183. The district court's order granting summary judgment in favor of respondents (Pet. App. 39a-49a), dated September 6, 2002, is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 2003. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISION

The Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, provides in relevant part:

(a) It shall be unlawful for an employer—

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age * * *
>
> * * * *

(f) It shall not be unlawful for an employer, employment agency, or labor organization—

> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age * * *.

29 U.S.C. 623

STATEMENT

Petitioners allege that respondents violated the Age Discrimination in Employment Act by adopting a pay policy that has a disparate impact on employees who are forty years of age and older. Acknowledging the deep split among the courts of appeals, the Fifth Circuit held that disparate impact claims are not cognizable under the ADEA.

1. The ADEA makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age," 29 U.S.C. 623(a)(1), or "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as employee, because of such individual's age," *id.* § 623(a)(2). In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), this Court interpreted nearly identical language in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a), to encompass both disparate treatment and disparate impact theories of liability.

Disparate treatment claims allege intentional discrimination on the basis of a protected characteristic. To succeed on a disparate treatment theory, plaintiffs must show that a protected characteristic "actually played a role [in the employer's decision] and had a determinative influence on the outcome." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

In contrast, disparate impact claims—such as the claim at issue in this petition—do not depend on the motivation for the challenged practice. Under a disparate impact theory, an employee must instead demonstrate that an employer's plan or policy adversely affected a protected group in comparison to members of a non-protected group. *See Hazen Paper Co.*, 507 U.S. at 609 (citing *Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977)); *Griggs*, 401 U.S. at 431 (characterizing disparate impact claims as looking beyond "overt discrimination * * * [to] practices that are fair in form, but discriminatory in operation").

2. Petitioners are police officers and public safety officers employed by respondents, the City of Jackson, Mississippi and its police department. Petitioners are all at least forty years of age and therefore fall within the class protected by the ADEA. *See* 29 U.S.C. 631(a).

Respondents recalibrated their employee pay scale by adopting a Performance Pay Plan on October 1, 1998, and revising it effective March 1, 1999 ("Pay Plan"). The new scale progresses from Step 1 to Step 5 in half-step increments, with each half step corresponding to a defined pay range. The Pay Plan initially assigned employees with fewer than five years of service to Step 1 and employees with five or more years of service to Step 1.5. Each employee was entitled to at least a 2% raise from his or her pre-Pay Plan salary. If the initial assignment failed to increase the employee's salary by at least 2%, the employee was then placed in the lowest half step that resulted in at least a 2% increase from his or her previous salary. Employees whose pay was already higher than the minimum salary in the Step 5 range received only a 2% raise.

Petitioners allege that the Pay Plan had a disparate impact on employees who are age forty or older by providing them

with proportionately smaller wage increases than were granted to employees under the age of forty.[1]

3. The district court granted respondents' motion for summary judgment on the grounds that the ADEA "does not allow for claims of disparate impact." Pet. App. 47a-48a. Although acknowledging that "[t]he Circuit Courts that have considered the issue are split," *id.* at 46a, the district court followed the circuits that have refused to allow disparate impact claims. Emphasizing the Eleventh Circuit's view that "the use of factors correlated with age * * * did not rely on 'inaccurate and stigmatizing stereotypes' and was acceptable," *id.* at 47a (quoting *Adams v. Florida Power Corp.*, 255 F.3d 1322, 1326 (CA11 2001) (internal citation omitted), *cert. granted*, 534 U.S. 1054 (2001), *writ dismissed as improvidently granted*, 535 U.S 228 (2002)), the district court concluded that *Hazen Paper* strongly suggested that "no disparate impact claim should lie in cases such as this one." Pet. App. 47a.

4. A divided panel of the court of appeals affirmed. The majority opinion acknowledged the current "debate amongst the courts of appeals regarding whether the ADEA, like Title VII, entitles a plaintiff to bring a disparate impact claim," Pet. App. 6a, and, "[a]fter surveying the well-traversed arguments" of this debate, *id.* at 7a, concluded that "a disparate impact theory of liability is not cognizable under the ADEA," *id.* at 21a. The majority rejected the approach taken by the Second, Eighth, and Ninth Circuits, aligning itself instead with the First, Seventh, Tenth, and Eleventh Circuits.

The court of appeals based its decision on the statute's text and legislative history. The court acknowledged the similarities between Title VII and the ADEA, but stressed that the ADEA allows employers to differentiate between

[1] Petitioners also alleged that the Pay Plan constituted illegal disparate treatment. The Fifth Circuit remanded that claim to the district court, and it is not at issue here.

employees based upon "reasonable factors other than age," 29 U.S.C. 623(f)(1), while Title VII does not. The court of appeals then noted that in *County of Washington v. Gunther*, 452 U.S. 161, 169-71 (1981), this Court interpreted the Equal Pay Act's exception for different treatment based on "any other factor other than sex," 29 U.S.C. 206(d)(1), to preclude disparate impact claims. Pet. App. 16a. It concluded that the "reasonable factors other than age" exception makes the ADEA more like the Equal Pay Act than Title VII. *Id.* at 17a. The majority also considered the ADEA's legislative history and concluded that Congress only intended the statute to prohibit intentional discrimination based on age. *Id.* at 18a-22a.

Judge Stewart dissented vigorously, arguing that the ADEA's "reasonable factors other than age" language merely codified a business necessity exception to disparate impact claims analogous to the one available under Title VII, as opposed to prohibiting such claims outright. He further rejected the majority's reliance on the Equal Pay Act. He argued that the majority ignored the fact that the "terms 'any' [as found in the EPA] and 'reasonable' [as found in the ADEA] are not synonymous." Pet. App. 32a. Turning to the legislative history, Judge Stewart noted that the ADEA, like Title VII, was intended to "rid[] from the workplace an environment of *concealed* discrimination" and that "a disparate impact theory may be a plaintiff's only tool in counteracting sophisticated discrimination." *Id.* at 34a. Ultimately, Judge Stewart concluded that the majority erred when it refused to find disparate impact claims cognizable under the ADEA.

This petition followed.

REASONS FOR GRANTING THE WRIT

The circuits are intractably divided over whether disparate impact claims are cognizable under the Age Discrimination in Employment Act. Given the importance of the ADEA to the American workplace, such a conflict is

untenable. This case presents the ideal vehicle to decide this important and frequently litigated issue. Finally, the Fifth Circuit erred in concluding that the ADEA forbids disparate impact claims despite this Court's holding that the indistinguishable language of Title VII permits such actions. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Certiorari accordingly should be granted.

I. The Courts of Appeals Are Intractably Divided over the Question Presented.

In its opinion, the Fifth Circuit acknowledged that there is a longstanding and deep conflict among the circuits over whether disparate impact claims are cognizable under the ADEA. Pet. App. 6a-7a. This Court granted certiorari to resolve that question in *Adams v. Florida Power Corp.*, 534 U.S. 1054 (2001), but ultimately dismissed the writ as improvidently granted. 535 U.S 228 (2002). Indeed, the question has been noted as appropriate for resolution for more than two decades. *See Markham v. Geller*, 451 U.S. 945, 948-49 (1981) (Rehnquist, J., dissenting from denial of certiorari).

Three circuits—the Second, Eighth, and Ninth—squarely hold that disparate impact claims are cognizable under the ADEA. *See, e.g., Smith v. Xerox Corp.*, 196 F.3d 358, 367 (CA2 1999) (citing *Geller v. Markham*, 635 F.2d 1027, 1032 (CA2 1980)); *Lewis v. Aerospace Community. Credit Union*, 114 F.3d 745, 750 (CA8 1997), *reh'g and sugg. for reh'g en banc denied* (July 3, 1997), *cert. denied sub nom. Kelleher v. Aerospace Cmty. Credit Union*, 523 U.S. 1062 (1998); *Frank v. United Airlines Inc.*, 216 F.3d 845, 856 (CA9 2000), *cert. denied*, 532 U.S. 914 (2001).

In contrast, five circuits—the First, Fifth, Seventh, Tenth, and Eleventh—apply the contrary rule. These courts, while acknowledging that the circuits are split on this issue, have held that disparate impact claims may not be brought under the ADEA. *See Mullin v. Raytheon Co.*, 164 F.3d 696, 701 (CA1 1999); *EEOC v. Francis W. Parker School*, 41 F.3d

1073, 1076-78, 1079 (CA7 1994), *reh'g and sugg. for reh'g en banc denied* (Nov. 18, 1994), *cert. denied*, 515 U.S. 1142 (1995); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1009 (CA10 1996), *reh'g denied* (Feb. 9, 1996), *cert. denied*, 517 U.S. 1245 (1996); *Adams v. Florida Power Corp.*, 255 F.3d 1322, 1326 (CA11 2001), *cert. granted*, 534 U.S. 1054 (2001), *writ dismissed as improvidently granted*, 535 U.S 228 (2002).

This circuit split has not been resolved by this Court's opinion in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).

Prior to *Hazen Paper*, most courts that considered the issue had held that disparate impact claims were available under the ADEA. *See Holt v. Gamewell Corp.*, 797 F.2d 36 (CA1 1986); *Maresco v. Evans Chemetics, Div. of W.R. Grace & Co.*, 964 F.2d 106 (CA2 1992); *MacNamara v. Korean Air Lines*, 863 F.2d 1135 (CA3 1988), *cert. denied*, 493 U.S. 944 (1989); *Wooden v. Bd. of Educ. of Jefferson Cty., Ky.*, 931 F.2d 376 (CA6 1991); *Monroe v. United Airlines, Inc.*, 736 F.2d 394 (CA7 1984), *cert. denied*, 470 U.S. 1004 (1985); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686 (CA8 1983); *MacPherson v. Univ. of Montevallo*, 922 F.2d 766 (CA11 1991). *See also Faulkner v. Super Valu Stores*, 3 F.3d 1419 (CA10 1993). Even though *Hazen Paper* expressly left open the question whether the ADEA allows disparate impact claims, 507 U.S. at 610, it caused some lower courts "to rethink the viability of disparate impact doctrine in the ADEA context." *Mullin*, 164 F.3d at 700.

But since *Hazen Paper*, several circuits have firmly adhered to their precedents holding that disparate impact claims are cognizable. These circuits have announced that they will not change their interpretation "absent a 'clear indication' that it has been overruled." *Smith v. City of Des Moines*, 99 F.3d 1466, 1470 (CA8 1996) (internal citation omitted). *See also Smith v. Xerox Corp.*, 196 F.3d at 367 n.6 (reaffirming the Second Circuit's recognition of disparate

impact claims even though "[s]everal circuits have rejected or called into questions the availability of a disparate impact cause of action under the ADEA in light of *Hazen*"); *Frank*, 216 F.3d 845 (holding that the district court erred by concluding that disparate impact claims were no longer available after *Hazen Paper*).

This Court's intervention is therefore required because the circuit conflict is intractable. While some courts reconsidered their positions in the immediate aftermath of *Hazen Paper*, it has now been over a decade since that decision. In that time, the courts of appeals have solidified their positions, consistently denying petitions for rehearing and rehearing en banc. *EEOC v. Francis W. Parker School*, 41 F.3d 1073 (CA7 1994), *reh'g and sugg. for reh'g en banc denied* (Nov. 18, 1994), *cert. denied*, 515 U.S. 1142 (1995); *EEOC v. Local 350, Plumbers and Pipefitters*, 998 F.2d 641 (CA9 1992), *as amended on denial of reh'g and reh'g en banc* (July 6, 1993); *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (CA10 1996), *reh'g denied* (Feb. 9, 1996), *cert. denied*, 517 U.S. 1245 (1996). Indeed, the circuits' positions have become so entrenched that the courts no longer discuss the reasoning behind their conclusions, but merely reiterate that a disparate impact claim is, or is not, cognizable within that circuit. *See, e.g., Adams v. Ameritech Services*, 231 F.3d 414, 422 (CA7 2000), *reh'g and reh'g en banc denied* (Jan. 9, 2001) (stating simply that "disparate impact is not a theory available to age discrimination plaintiffs in this circuit"); *Lewis*, 114 F.3d at 750 (noting merely that "[a]lthough the Supreme Court has yet to rule on this legal question, [the Eighth Circuit] continues to recognize the validity of such claims under the ADEA") (internal citation omitted).

The circuits' firm commitments to their conflicting views demonstrate that this Court's intervention is necessary.

II. The Circuit Conflict Is Untenable Given the Importance of the Question Presented.

Almost seventy million employees age forty and over—nearly half of the civilian labor force—are protected by the ADEA. U.S. Department of Labor, Bureau of Labor Statistics, *at* http://data.bls.gov/labjava/outside.jsp?survey=ln (last visited Feb. 2, 2004). Because the Act covers so many employees, the question presented is of great importance to the national economy.

It is therefore unsurprising that eight circuits have taken a position on this question and that most have faced the issue repeatedly. For example, since *Hazen Paper*, the Eighth Circuit has published nine decisions in which disparate impact claims were squarely presented.[2] Furthermore, federal district courts have reported at least ninety-five opinions since *Hazen Paper* in which disparate impact was alleged.[3]

---

[2] *Evers v. Alliant Techsystems, Inc.*, 241 F.3d 948 (CA8 2001); *Allen v. Energy Corp., Inc.*, 193 F.3d 1010 (CA8 1999); *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948 (CA8 1999); *Lewis*, 114 F.3d 745; *Thomas v. First Nat'l Bank of Wynne*, 111 F.3d 64 (CA8 1997); *Smith v. City of Des Moines*, 99 F.3d 1466; *Pulla v. Amoco Oil Co.*, 72 F.3d 648 (CA8 1996); *Houghton v. SIPCO, Inc.*, 38 F.3d 953 (CA8 1994); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379 (CA8 1994).

[3] This statistic was derived from a Westlaw search for reported U.S. district court cases in which the words "disparate impact" appeared within 20 words of "ADEA" or "Age Discrimination in Employment Act" (excluding any cases in which the court was merely describing the theory, as opposed to considering its relevance to that case). This statistic underestimates the number of disparate impact claims that were actually brought, as many district court rulings were unreported. Moreover, this number of course excludes the many disparate impact claims that have been settled, as well as the otherwise valid claims that plaintiffs have forgone pursuing in the five circuits that currently forbid such claims. And, naturally, the potential exposure to liability under the ADEA affects employers' decisions in designing

The importance of this question is heightened because it is outcome determinative. Where disparate impact claims are available, employees have been able to vindicate their rights in the federal courts. For example, in *EEOC v. Hickman Mills Consolidated School District No. 1*, 99 F. Supp. 2d 1070 (W.D. Mo. 2000), the court granted summary judgment in favor of plaintiffs on their disparate impact claim. Their employer had a policy that decreased early retirement benefits by 10% for every year a teacher worked beyond the date when he or she was first eligible for full retirement. Because plaintiffs showed through statistical analysis that "as age at retirement went up, the average percent and dollar amount of benefit went down," *id.* at 1077, and the school district "failed to submit any substantial proof of savings" to justify its policy, *id.* at 1078, plaintiffs prevailed on their disparate impact claim. In contrast, where the cognizability of such claims has been rejected, employees are left without a remedy when they have been subjected to policies that unfairly disadvantage them.

The frequent recurrence of this issue and its importance to tens of millions of Americans makes the conflict among the circuits untenable. Under the current legal regime, the scope of an employee's federal rights varies with the location of his or her employment. As long as the circuits disagree, police officers in Jackson, Missouri (within the Eighth Circuit) are protected against policies that disproportionately affect older employees, whereas officers in Jackson, Mississippi (within the Fifth Circuit) are not. The present situation also creates special difficulties for employees of corporations with multiple offices nationwide, most of whom are likely unaware that the acceptance of a transfer or promotion to another location may strip them of rights that they would otherwise have. Indeed, forum selection clauses in employment contracts may deprive even those employees who work within

---

their employment policies, meaning that the law's impact cannot be measured in terms of the number of litigated cases alone.

circuits that allow disparate impact claims of the rights enjoyed by their neighbors.

The central role that the ADEA plays in millions of Americans' employment relationships underscores the need for clear guidance from this Court.

III. This Case Is an Ideal Vehicle to Resolve the Question Presented.

Petitioners' complaint sets out a prototypical disparate impact claim by challenging the effect of a specific employment practice upon a class of protected workers. Petitioners challenge the respondents' 1998 adoption of a new Pay Plan, which set new salary ranges based on employees' years of service and previous earnings. Using statistical analysis of the Pay Plan's effects on all employees, petitioners allege that the adoption of the Plan had a disparate impact upon the class of employees protected by the ADEA. The Complaint expressly alleges that the Plan "increased the pay for younger workers at the expense of the officers and employees who were over 40 years of age." Complaint ¶ 9. Petitioners' expert subsequently determined that the Plan "resulted in pay increases to officers under forty years of age that were four standard deviations higher than the raises received by officers over forty." Pet. App. 5a.

Thus, petitioners' claim mirrors the kind of disparate impact claims this Court has recognized under the nearly identical language of Title VII. For example, in *Griggs*, this Court invalidated a power company's promotion policy that required either a high school diploma or an intelligence test, since that policy disproportionately limited employment opportunities for racial minorities and bore no demonstrable relationship to job performance. 401 U.S. at 431. Similarly, in *Dothard v. Rawlinson*, 433 U.S. 321, 329-32 (1977), this Court invalidated an Alabama policy requiring a minimum height and weight for prison guards, since the policy had a disparate impact on female applicants and the state did not prove that it was correlated with job performance. Congress

eventually amended Title VII to codify this proscription of employment practices that have a disparate impact upon a protected class but are unjustified by a business necessity. *See* 42 U.S.C. 2000e-2(k)(1)(A)(i). This case, like *Griggs*, *Dothard*, and actions arising under § 2000e-2(k), challenges a clear, nondiscretionary employment practice with a calculable disproportionate impact on a protected class.

Courts in other circuits have found liability on disparate impact claims analogous to the allegations presented in petitioners' complaint. In *Geller v. Markham*, 635 F.2d 1027 (CA2 1980), *cert. denied*, 451 U.S. 945 (1981), for example, the Second Circuit held that a school district's policy of refusing to hire teachers with more than five years of experience had a disparate impact upon older workers, given the plaintiffs' statistical evidence showing a "high correlation between experience and membership in the protected age group." *Id.* at 1033. Similarly, in *Leftwich v. Harris-Stowe State College*, 702 F.2d 686 (CA8 1983), the Eighth Circuit found that a policy reserving spots for less expensive, non-tenured professors on a new state college faculty had a disparate impact on employees protected by the ADEA, given the plaintiffs' statistical evidence of a "positive, significant correlation between age and salary for faculty members." *Id.* at 690. The Pay Plan at issue here is similar to the challenged employment practices in *Geller* and *Leftwich*, and petitioners intend to introduce similar evidence to show that the Pay Plan has a disparate impact on protected workers.

The foregoing illustrates why this case, unlike *Adams v. Florida Power Corp.*, 255 F.3d 1322 (CA11 2001), *cert. granted*, 534 U.S. 1054 (2001), *cert. dismissed as improvidently granted*, 535 U.S. 228 (2002), and *Thweatt v. Electronic Data Systems Corp.*, *cert. denied*, 124 S. Ct. 922 (2003), is the ideal vehicle to resolve the question presented. This case is fundamentally different from *Adams*, in which members of this Court pressed the petitioners to identify "the precise rule * * * that's comparable to a high school diploma," as in *Griggs*, or "a height and weight" standard, as

in *Dothard*. Oral Arg. Trans., No. 01-584, *Adams v. Florida Power Corp.*, at 15. Adams' counsel was unable to identify any practice that caused the disparate impact, save the employer's general "decision to downsize itself." *Id.* at 7. *See also id.* at 15-16. In contrast to *Adams*, but like *Griggs* and *Dothard*, petitioners here challenge a specific employment practice—the Pay Plan, an explicit, written policy.

This case is also very different from *Thweatt*, in which the petitioners asked this Court to review a "Performance Management *Process*" that used manager evaluations to rank employees, to determine compensation, and to select candidates for termination. Pet. for Cert., No. 03-349, *Thweatt v. Electronic Data Systems Corp.*, at 9 (emphasis added). The respondents in *Thweatt* correctly noted that the petitioner's claim was inappropriate under a disparate impact theory since it challenged a discretionary review policy where "members of the protected class were evaluated and ranked at different times, by different decision-makers, based on different considerations or criteria, as part of a multi-layered selection process." Brief in Opposition, No. 03-349, *Thweatt v. Electronic Data Systems Corp.*, at 11. Unlike the "process" at issue in *Thweatt*, the Pay Plan at issue here was non-discretionary and assigned petitioners to steps within the new pay scale based solely on their tenure and their current salary.

As the effects of this employment practice can be precisely measured in monetary terms, petitioners had little difficulty performing the kind of statistical analysis required for a disparate impact claim. Indeed, the ability to consider the statistical effect of the Pay Plan on the protected class, without reference to respondents' possible motivations for changing its policy, makes this case an ideal vehicle to consider the disparate impact claim as distinct from the disparate treatment claim.

IV. The Fifth Circuit's Decision Is Wrong on the Merits.

Congress enacted Title VII in 1964 to forbid employers to "fail or refuse to hire or to discharge any individual, or

otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * *." 42 U.S.C. 2000e-2(a)(1). In 1971, this Court held that Title VII's language authorizes both disparate impact and disparate treatment claims for employment discrimination. *See Griggs*, 401 U.S. at 431. In 1967, Congress used precisely the same language in drafting the Age Discrimination in Employment Act, merely substituting the word "age" for the words "race, color, religion, sex, or national origin." 29 U.S.C. 623(a)(1). Three circuit courts have correctly held that the text of the ADEA, like the identical text of Title VII on which it was based, authorizes both disparate impact and disparate treatment claims.

Congress' intent in enacting the ADEA can only be effected by recognizing disparate impact claims. The Act was passed to combat subtle age discrimination "based in large part on stereotypes unsupported by objective fact." *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983). Disparate impact claims are particularly appropriate to target these sorts of subtle employment biases. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 988 (1988) (noting that Title VII disparate impact claims need not be limited to "cases in which the challenged practice served to perpetuate the effects of pre-Act intentional discrimination"). Limiting the ADEA only to disparate treatment claims would fall far short of Congress' goal of eradicating subtle discrimination against employees age forty and older, since disparate treatment claims fail "[u]nless it is proven that an employer intended to disfavor the plaintiff *because of* his membership in a protected class." *Watson*, 487 U.S. at 1002 (emphasis added).

The provision of the ADEA principally relied on by the Fifth Circuit majority, 29 U.S.C. 623(f), does not call for a different result. That provision exempts from the Act otherwise invidious differentiation that is "based on reasonable factors other than age." To be sure, that language,

as the majority noted, bears some similarity to the Equal Pay Act's exception for "any other factor other than sex," 29 U.S.C. 206(d)(1)(iv), which has been interpreted by this Court to prohibit disparate impact claims under the EPA. *County of Washington v. Gunther*, 452 U.S. 161, 169-71 (1981). However, as Judge Stewart correctly noted in his dissent, "the flaw in the majority's logic is that the terms 'any' and 'reasonable' are not synonymous." Pet. App. 32a. A more appropriate interpretation of the "reasonable factors other than age" provision would render it a defense to liability, much like a showing of "business necessity" can negate a prima facie claim of disparate impact in a Title VII case. *See* 42 U.S.C. 2000e-2(k)(1)(A)(i). *See also Griggs*, 401 U.S. at 431.

The conclusion that disparate impact claims are cognizable under the ADEA is reinforced by the Equal Employment Opportunity Commission's settled interpretation of the Act. The EEOC's interpretation is owed deference, as it is the executive agency charged with enforcing the Act. *See* 29 U.S.C. 625 (noting transfer of the enforcement authority from the Secretary of Labor to the EEOC by Exec. Order No. 12,106, 44 Fed. Reg. 1053 (Dec. 28, 1978)). The EEOC has stated that "[w]hen an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a 'factor other than' age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity." 29 C.F.R. 1625.7(d). This interpretation, which has remained constant for more than two decades, was specifically drafted "to make it clear that employment criteria that are age-neutral on their face but which nevertheless have a disparate impact on members of the protected age group must be justified as a business necessify." 46 Fed. Reg. 47,724 (Sept. 29, 1981).

Because this interpretation is set forth in a published regulation that was the product of formal notice-and-comment rulemaking—a fact the court below ignored, treating it as

though it were simply an informal, internal agency guideline, Pet. App. 10a n.5—it is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984).[4] *See* 46 Fed. Reg. 47,724 (describing the notice-and-comment proceedings for 29 C.F.R. 1625.7(d)). Even if *Chevron* were inapplicable, however, considerable deference would still be due. This Court has squarely held that EEOC interpretive guidelines are entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 111 (2002). The court of appeals wrongly suggested that no deference at all is due—indeed, that the guidelines need not even be treated as having "persuasive force"—because EEOC did not "thoughtfully consider[]" its interpretation but instead simply "assumed" the disparate impact theory was available.

---

[4] The ADEA, unlike Title VII, provides the EEOC with authority to promulgate substantive rules and regulations to carry out the statute. *Compare* 29 U.S.C. 628 (permitting the EEOC to "issue such rules and regulations as it may consider necessary or appropriate for carrying out [the ADEA]") *with* 42 U.S.C. 2000e-12(a) (permitting the EEOC "to issue * * * suitable *procedural* regulations to carry out [Title VII]") (emphasis added). The Commission's interpretative regulations under the ADEA are therefore distinct from the more limited interpretative guidelines that the EEOC may issue under Title VII. Thus, this Court's previous refusal to provide *Chevron* deference to the EEOC guidelines interpreting Title VII, *see, e.g., Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 111 n.6 (2002), is inapposite both because the agency's powers under the two statutes differ and because the Title VII guidelines were not a product of notice-and-comment rulemaking like the ADEA regulations at issue here. Thus, the courts of appeals have applied *Chevron* deference to EEOC's interpretations of the ADEA in numerous cases, *see, e.g., Sanchez v. Pacific Powder Co.*, 147 F.3d 1097, 1099-1100 (CA9 1994) (giving Chevron to EEOC interpretation of the ADEA); *Kralman v. Illinois Dep't of Veterans' Affairs*, 23 F.3d 150, 155 (CA7 1994) (same).

Pet. App. 10a n.5. This suggestion flatly ignores the notice-and-comment procedures EEOC employed, as well as the fact that the agency has maintained its interpretation consistently for twenty years notwithstanding the unspecified "subsequent developments" to which the court of appeals obliquely referred. *Id.*

Even had it not sought public comment, EEOC's own substantial expertise would render its interpretations "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore*, 323 U.S. at 140. *See Griggs*, 401 U.S. at 434 (giving "great deference" to the EEOC's interpretation of federal employment law); *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 412 (1985) (relying on the EEOC's guidelines to interpret the scope of the bona fide occupational qualification exception to the ADEA). This Court has held that consistent, long-held agency interpretations merit particularly deferential treatment under *Skidmore*. *See, e.g., Alaska Dep't of Env'tl Conservation v. EPA*, __ U.S. __, 72 U.S.L.W. 4133 (holding that because petitioner's arguments "do not persuade us to *reject as impermissible* EPA's longstanding, consistently maintained interpretation," that interpretation, as embodied in an interpretive guideline, must be upheld (emphasis added)). Moreover, EEOC's interpretations of its own regulations, such as those contained in 46 Fed. Reg. 47,724, are of course entitled to a very high degree of deference. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (holding that an agency's interpretation of its own regulation—even one presented only in a legal brief—is "controlling unless plainly erroneous or inconsistent with the regulation" (quotation marks omitted)).

* * * *

Unless settled by this Court, this intractable and widely acknowledged split among the courts of appeals will continue to produce results that arbitrarily differ according to the jurisdiction in which ADEA cases are litigated. As a prototypical disparate impact claim that challenges a

particular employment practice through the use of statistical analysis, this case would serve as an ideal vehicle to examine whether such claims are actionable under the ADEA. Finally, the decision reached by the court below incorrectly barred petitioners' disparate impact claims, and should be reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Pamela S. Karlan
559 Nathan Abbot Way
Stanford, CA 94305

Dennis L. Horn
Horn & Payne, PLLC
P.O. Box 2754
Madison, MS 39130

Thomas C. Goldstein
(Counsel of Record)
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

February 10, 2004[5]

---

[5] Counsel for petitioners were principally assisted by the following students in the Stanford Law School Supreme Court Litigation Clinic: Michael P. Abate, William B. Adams, and Jennifer J. Thomas. Clinic members David M. Cooper, Eric J. Feigin, Daniel S. Goldman, and Nicola J. Mrazek also contributed.

APPENDICES

BEST AVAILABLE COPY

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-60850.

AZEL P. SMITH; JACQUELINE BUTLER; RUTHIE PORTER;
GLORIA BURNS;
WILLIE ALLEN; ET AL., PLAINTIFFS-APPELLANTS

v.

CITY OF JACKSON, MISSISSIPPI; POLICE DEPARTMENT OF THE
CITY OF JACKSON,
MISSISSIPPI, DEFENDANTS-APPELLEES.

Argued and Submitted:
Opinion Filed: Nov. 13, 2003
Opinion Revised: Dec. 4, 2003

Appeal from the United States District Court for the Southern
District of Mississippi;
William H. Barbour, District Judge, Presiding, D.C. No. 3:01-
CV-367-BN

Before KING, Chief Judge, and HIGGINBOTHAM and STEWART, Circuit Judges.

Opinion by Chief Judge KING; Concurrence in part and dissent in part by Judge STEWART.

OPINION

KING, Chief Judge.

Plaintiffs-appellants, thirty police officers and public safety dispatchers employed by the defendants-appellees, the City of Jackson and the Police Department of the City of Jackson, appeal the district court's order granting summary judgment in favor of the defendants. The appeal presents an issue of first impression in our circuit regarding whether a disparate impact theory of liability is available to plaintiffs suing for age discrimination under the Age Discrimination in Employment Act of 1967. The district court ruled that, as a matter of law, claims of disparate impact cannot be brought under the Act. We agree and therefore affirm the judgment of the district court as to this issue. However, because the district court granted summary judgment in favor of the defendants on the plaintiffs' disparate treatment claim before addressing pending motions related to the plaintiffs' ability to fully develop the summary judgment record, we vacate the district court's final judgment insofar as it dismissed the plaintiffs' disparate treatment claim.

I. PROCEDURAL HISTORY

On May 14, 2001, thirty police officers and public safety dispatchers—all over the age of forty and all employed by the defendants—filed suit pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* (2000). They claimed injuries as a result of an allegedly age- discriminatory performance pay plan ("the

plan") implemented by the defendants in order to grant substantially larger salary increases to police officers and public safety dispatchers (collectively "officers") under the age of forty. The plan was implemented by the defendants on October 1, 1998, and revised by the defendants on March 1, 1999. Under the plan, those officers and dispatchers with five or fewer years of tenure with the department received proportionately greater raises when compared to their former pay than those with more than five years of tenure. As stated by the district court:

> The plan accordingly created three categories for the purposes of the analysis of this case: 1) those officers and dispatchers with less than five years of tenure, most, if not all, of whom would have been under 40 years of age; 2) those 40 years of age or older, most, if not all, of whom would have had more than five years of tenure, and; 3) those under 40 years of age with more than five years of tenure.

On December 11, 2001, the plaintiffs moved to compel certain fiscal and personnel discovery related to the implementation and revision of the plan; the magistrate judge overseeing disputes related to discovery in this matter granted this motion on January 16, 2002, concluding that "the fiscal and personnel discovery requested by the Plaintiffs is not privileged ... and should be produced." On June 5, 2002, the plaintiffs filed a "motion for sanctions, a default judgment, attorneys' fees and expenses, expert witness fees and a continuance," seeking to have the defendants comply with disclosure and discovery obligations as set forth in the Federal Rules of Civil Procedure and the order of the magistrate judge. Two days later, the defendants moved for summary judgment, and the plaintiffs thereafter moved to strike certain exhibits to the defendants' motion, in part because the existence of the documents attached as exhibits

had been previously denied by the defendants.

On September 6, 2002, while the plaintiffs' motions were pending, the district court granted summary judgment in favor of the defendants on the plaintiffs' disparate impact and disparate treatment claims and denied the plaintiffs' pending motions as moot. Final judgment was entered on this same date.

The plaintiffs appeal this final judgment, maintaining that: (1) the district court erred in concluding that a disparate impact theory of liability is not cognizable under the ADEA, and (2) the district court erred in improvidently dismissing the plaintiffs' disparate treatment claim pending production by the defendants of requested discovery materials.

II. STANDARD OF REVIEW

We review the grant of summary judgment *de novo*, applying the same standards as did the district court. *Daniels v. City of Arlington*, 246 F.3d 500, 502 (5th Cir.), *cert. denied*, 534 U.S. 951 (2001). Summary judgment should be granted if there is no genuine issue of material fact for trial and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). In determining if there is a genuine issue of material fact, this court reviews the evidence in the light most favorable to the non-moving party. *Daniels*, 246 F.3d at 502.

III. THE PLAINTIFFS' DISPARATE IMPACT CLAIM

The plaintiffs raise both disparate treatment and disparate impact theories of liability here. Regarding their disparate treatment claim, the plaintiffs allege that the defendants were motivated by age to implement a plan that discriminated against them intentionally. Regarding their disparate impact theory, the plaintiffs allege that the implementation of the facially neutral plan by the defendants

gives rise to liability without a showing of intentional age motivation because the plan resulted in pay increases to officers under forty years of age that were four standard deviations higher than the raises received by officers over forty. In support of their disparate impact theory, the plaintiffs proffered to the district court statistical data demonstrating that the average pay increases made pursuant to the plan differed by age and that older officers received smaller raises than their younger counterparts.

In a disparate treatment case, liability depends on whether the protected trait—here, age—actually motivated the employer's decision. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). The employer may have relied on a facially discriminatory policy requiring adverse treatment of older employees or may have been motivated by age to discriminate against an individual on an ad hoc basis—"[w]hatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." *Id.* Proof of discriminatory motive is thus critical to the success of a plaintiff's discriminatory treatment claim. *Id.* In contrast, in a disparate impact case, liability may result without a demonstration of discriminatory motive. *Id.* at 609. Disparate impact claims arise from "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Id.* (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 n. 15 (1977)).

In 1971, the Supreme Court held that plaintiffs may bring disparate impact claims under Title VII. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971). This judicial construction of the statute was codified by Congress in 1991 to make clear that such a theory was available to plaintiffs. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a),

105 Stat. 1071, 1074-75 (adding 42 U.S.C. § 2000e-2(k)).[1] The availability of a disparate impact theory under the ADEA, however, is not so clear. In *Hazen Paper Co. v. Biggins*, the Supreme Court expressly declined to weigh in on whether the ADEA entitles a plaintiff to bring a disparate impact cause of action, stating that "we have never decided whether a disparate impact theory of liability is available under the ADEA, and we need not do so here." 507 U.S. at 610 (internal citation omitted).

This express reservation has led to a debate amongst the courts of appeals regarding whether the ADEA, like Title VII, entitles a plaintiff to bring a disparate impact claim. Those courts of appeals extending the holding in *Griggs* to the ADEA do so based on the textual similarities between the prohibitory sections of the ADEA and Title VII. *See Frank v. United Airlines, Inc.*, 216 F.3d 845, 856 (9th Cir.2000) (stating, post-*Hazen*, that "[w]e see no reason to depart from our conclusion ... and we again hold that a disparate impact claim is cognizable under the ADEA"); *Criley v. Delta Air Lines Inc.*, 119 F.3d 102, 105 (2d Cir.1997) (following, without discussion, pre-*Hazen* law in stating that "in our circuit, we have recognized such a [ ] [disparate impact] action"); *Smith v. City of Des Moines*, 99 F.3d 1466, 1470

[1] We note that the same statute did not make a parallel amendment to the ADEA, although it did amend the ADEA in other ways. Some of our sister circuits have concluded that this omission (together with other factors) indicates a congressional intent that a disparate impact cause of action not be available under the ADEA. *See Mullin v. Raytheon Co.*, 164 F.3d 696, 703 (1st Cir.1999); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1008 (10th Cir.1996). Such congressional inaction is susceptible of multiple interpretations, however, and so we should hesitate before we draw inferences from it. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988). The Civil Rights Act of 1991 was mainly aimed at overriding certain interpretations of Title VII, and so we do not find it especially probative with respect to the question before us today. Accordingly, our interpretation of the ADEA, set forth later in this opinion, rests on other grounds.

(8th Cir.1996) (stating that "even if we believed that *Hazen Paper* cast doubt on the validity of [pre-*Hazen* case law], *Houghton* [a post-*Hazen* case] represents the law of this Circuit" and must therefore be followed). Those courts of appeals declining to hold that a disparate impact theory is cognizable under the ADEA recognize the significant textual overlap in the prohibitory sections of the ADEA and Title VII, but they also look beyond this similarity, examining the entire ADEA statute (and the purpose behind its enactment) and finding important differences between the ADEA and Title VII that counsel against extending the *Griggs* holding to the ADEA context. *See Adams v. Fla. Power Corp.*, 255 F.3d 1322, 1325-26 (11th Cir.) (holding that disparate impact claims may not be brought under the ADEA, in part because "the history of the ADEA differs from the legislative history of Title VII, which the Supreme Court in *Griggs* relied on to find a cause of action for disparate impact"), *cert. granted*, 534 U.S. 1054 (2001), *cert. dismissed*, 535 U.S. 228 (2002); *Mullin*, 164 F.3d at 703 ("Congress never intended to make a disparate impact cause of action available under the ADEA."); *Maier v. Lucent Tech., Inc.*, 120 F.3d 730, 735 (7th Cir.1997) ("[S]uch a theory of liability [disparate impact] is not cognizable under the ADEA."); *Ellis*, 73 F.3d at 1001 ("[W]e hold that ADEA claims cannot be based on a disparate impact theory of discrimination.").[2]

After surveying the well-traversed arguments on either side of this debate, we hold that the ADEA was not intended

[2] After *Hazen*, the Third and the Sixth Circuits have both expressed "considerable doubt" regarding whether a claim of age discrimination may be stated under a disparate impact theory. *Lyon v. Ohio Educ. Ass'n & Prof'l Staff Union*, 53 F.3d 135, 139 n. 5 (6th Cir.1995) ("The Court's focus in *Hazen Paper* on Congress's intent to prevent discrimination based on inaccurate and damaging stereotypes suggests that incidental discriminatory effects arising from facially age- neutral policies are not redressable."); *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732 (3d Cir.1995) (opinion of Greenberg, J.) (stating that "the analysis in *Hazen* casts considerable doubt on the viability of the theory"). However, in neither case was the issue directly before the court.

to remedy age-disparate effects that arise from the application of employment plans or practices that are not based on age. Fundamental to our decision is the ADEA's express exception permitting employer conduct based on "reasonable factors other than age"--an exception absent from Title VII--and the inapplicability to the ADEA context of the policy justifications identified by the Supreme Court (in *Griggs*, 401 U.S. at 430-31) for recognizing a disparate impact cause of action in the Title VII context.

A. Similarities Between the ADEA and Title VII

The construction of a statute begins with the text of the statute itself. The ADEA prohibits discrimination on the basis of age. *See* 29 U.S.C. § 623 (2000). It was enacted in 1967, before the Supreme Court first interpreted Title VII to allow employees to prove discrimination by showing disparate impact. *See Griggs*, 401 U.S. at 431. The plaintiffs correctly identify the core sections expressly prohibiting discrimination "because of [an] individual's age" in the ADEA--§ 623(a)(1) and (a)(2)--as overlapping almost identically with the core sections expressly prohibiting discrimination "because of [an] individual's race, color, religion, sex, or national origin" in Title VII--42 U.S.C. § 2000e-2(a)(1) and (2).[3] This is no coincidence; "the

[3] Section 623's prohibitory subsections provide, in relevant part, that it is unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age....

prohibitions of the ADEA were derived *in haec verba* from Title VII." *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). The only differences in the prohibitory language contained in these statutes are: (1) Title VII protects against discrimination on the basis of "race, color, religion, sex, or national origin," while the ADEA protects against discrimination on the basis of "age"; and (2) Title VII extends protection also to "applicants" for employment, while the ADEA does not.

Although the ADEA's prohibitory provisions are at first blush read most naturally as outlawing only conduct motivated by age--the statute refers to actions taken "because of" age--*Griggs* of course held that parallel language in Title VII prohibited actions that had a race-disparate impact, irrespective of motive or intent. The significant overlap between the prohibitory sections of the ADEA and of Title VII persuaded the Second Circuit to hold early on, with little discussion, that a disparate impact theory of liability is likewise available under the ADEA. *See Geller v. Markham*, 635 F.2d 1027, 1031-32 (2d Cir.1980).[4] The Eighth and

29 U.S.C. § 623(a)(1)-(2). The prohibitory subsections of Title VII provide, in relevant part, that it is unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1)-(2).

[4] Then-Justice Rehnquist dissented from the denial of certiorari in *Geller*, 451 U.S. 945 (1981). In so doing, he stated that "[i]n my opinion, the decision of the Court of Appeals is inconsistent with the express provisions of the ADEA and is not supported by any prior decision of this Court." *Id.* at 947.

Ninth Circuits soon followed suit, again without any significant inquiry apart from drawing a parallel to Title VII. *See Leftwich v. Harris- Stowe State Coll.*, 702 F.2d 686, 690 (8th Cir.1983); *Douglas v. Anderson,* 656 F.2d 528, 531 n. 1 (9th Cir.1981).[5] As noted earlier, these circuits continue to follow that position.[6]

While the First, Seventh, Tenth, and Eleventh Circuits have likewise approached the statutory construction of the ADEA by looking at the text of the ADEA, they have (we think correctly) declined to limit their construction calculus solely to the prohibitory sections of the ADEA and Title VII. Instead, as we explore below, they look to the entire statute and legislative history of the ADEA to recognize important textual and policy-based differences between the ADEA and Title VII that demonstrate an intention on the part of Congress to allow for claims of intentional age discrimination, but not for claims of disparate impact discrimination.

---

[5] At around the same time, the EEOC issued new interpretive guidelines for the conduct of ADEA cases. We note that one portion of those guidelines seems to be based on the assumption that the *Griggs* framework applies to ADEA cases. *See* 46 Fed. Reg. 47,724, 47,725 (1981) (Sept. 29, 1981) (amending 29 C.F.R. § 1625.7(d)). Such guidelines are not entitled to *Chevron* deference. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256-58 (1991). We are of course still bound to treat them as having persuasive force, to the extent that they are thoughtfully considered. *See Christensen*, 529 U.S. at 587. The guideline in question does not purport to affirmatively establish that a disparate impact theory is available. Instead, it simply assumes, on the basis of *Griggs*, that such a theory is available. *See* 46 Fed. Reg. at 47,725. Given the absence of significant analysis, and in light of subsequent developments that have cast doubt on that assumption, we do not believe that this administrative guidance is convincing authority.

[6] The Seventh Circuit, which had originally permitted disparate impact suits under the ADEA, changed course after *Hazen*. *See EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073 (7th Cir.1994).

B. Differences Between the ADEA and Title VII

(1) Section 623(f)(1) of the ADEA

The ADEA's prohibitions against age discrimination in employment are qualified by several exceptions to employer liability set forth in § 623(f). Pursuant to one of these exceptions, an employer can avoid liability under the ADEA if the adverse employment action is "based on reasonable factors other than age." 29 U.S.C. § 623(f)(1).[7]

Neither the "reasonable factors other than age" exception nor a parallel provision is found in Title VII. Facially, the exception appears to serve as a safe harbor for employers who can demonstrate that they based their employment action on a reasonable non-age factor, even if the decision leads to an age- disparate result. In a pre-*Hazen* dissenting opinion, Judge Easterbrook argues against recognizing a disparate impact theory of liability under the ADEA based on this "reasonable factors other than age" exception:

> [Section (f)(1)], which says that "reasonable factors other than age" may be the basis of decision--impl[ies] strongly that the employer may use a ground of decision that is not age,

---

[7] Section 623(f)(1) provides, in relevant part:

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age....

29 U.S.C. § 623(f)(1).

> even if it varies with age. What else could be the purpose of this language? Surely it does not mean simply that "only age discrimination is age discrimination." "The prohibition and the exception appear identical. The sentence is incomprehensible unless the prohibition forbids disparate treatment and the exception authorizes disparate impact."

Metz v. Transit Mix, Inc., 828 F.2d 1202, 1220 (7th Cir.1987) (Easterbrook, J., dissenting) (quoting Douglas Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, 49 L. & CONTEMP. PROBS. 53, 55 (1986)). Post-*Hazen* case law likewise reads the inclusion of the "reasonable factors other than age" exception to imply a congressional intent to remedy only intentional discrimination because of age through the passage of the ADEA. For example, the First Circuit states:

> A critical asymmetry in the texts of the ADEA and Title VII counsels convincingly against recognizing a disparate impact cause of action under the former statute.... This ["reasonable factors other than age"] proviso permits employers to utilize factors other than age as grounds for employment-related decisions that differentially impact members of the protected class (individuals between the ages of 40 and 69). When this exception is read with the ADEA's general prohibition against age-based discrimination, the resulting construction follows: it shall be unlawful to "discriminate against any individual ... because of such individual's age," except when "based on ... factors other than age." Thus, if the exception contained in section 623(f)(1) is not understood to preclude disparate impact

> liability, it becomes nothing more than a bromide to the effect that "only age discrimination is age discrimination."

Mullin, 164 F.3d at 701-02. We too find that the inclusion of the "reasonable factors other than age" exception to the ADEA creates a critical "asymmetry" between the ADEA and Title VII.[8] The addition of this broad exception to the ADEA, on its face, appears to preclude a disparate impact theory of liability under the ADEA; at a minimum, it amounts to a salient textual difference between the substantive liability provisions of the ADEA and Title VII--a difference not mentioned by any of the courts of appeals which have extended *Griggs* to the ADEA context.[9]

While we believe that the "reasonable factors other than age" provision counsels against recognizing a disparate impact theory under the ADEA, we would not go so far as to

---

[8] In his dissent from the denial of certiorari in *Geller*, then- Justice Rehnquist likewise focused on § 623(f)(1) to support his view that Congress did not intend that a disparate impact claim be cognizable under the ADEA:

> In my view, Congress did not intend the ADEA to have the restraining influence on local governments which will result from the decision below. Congress revealed this intention in 29 U.S.C. § 623(f)(1), which provides that it shall not be unlawful for an employer to take any action otherwise prohibited "where the differentiation is based on reasonable factors other than age."

Geller, 451 U.S. at 948-49 (Rehnquist, J., dissenting from denial of cert.).

[9] This difference between the statutes also means that the rule of *in pari materia*, heavily relied upon by our colleague in dissent, is largely inapplicable to this case. For while we usually endeavor to give like language the same meaning, it is a cardinal rule of statutory interpretation that we are to consider the whole act, reading each section in light of the others. *E.g.,United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) ("Statutory construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme....").

say that it rules out any alternative reading. As the dissent argues, the prohibitory section and the "reasonable factors other than age" clause could together be read as announcing a general rule that disparate impact is actionable but then carving out a defense for adverse impacts that can be justified as a business necessity. The dissent's position is, of course, essentially how the courts have treated claims under Title VII. We do not believe this course is open to us, however. This circuit long ago held that § 623(f)(1)'s "reasonable factors other than age" provision does not create an affirmative defense to liability; rather, it allows the defendant to bring forward evidence to negate the plaintiff's prima facie case. *See Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588, 590-91 (5th Cir.1978). Furthermore, whether or not § 623(f)(1) is technically treated as a defense, we do not think that the reference to "reasonable factors other than age" can be taken to mean that all practices having a disparate impact are illegal unless they meet the stringent requirements of "business necessity." Indeed, the Supreme Court has suggested a different meaning for the clause, stating that it "insure[s] that employers [are] permitted to use *neutral criteria not directly dependent on age*." *EEOC v. Wyoming*, 460 U.S. 226, 232-33 (1983) (emphasis added); *cf. Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (2000) ("The exception simply makes clear that '[t]he employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly.'" (quoting *Hazen*, 507 U.S. at 611)). Therefore, we would not read the "reasonable factors other than age" clause as a limited derogation from a general prohibition against disparate impact. Instead, we believe that the soundest reading of the whole text is that the ADEA does not prohibit employers from taking actions based on non-age factors, except when those non-age factors are so related to age that they are mere proxies.[10] This reading of the text is also

[10] In order to resolve this case, we need not speculate on what such factors might be. The Supreme Court held in *Hazen* that adverse employment actions based on job tenure do not, without more, amount to disparate treatment based on age. 507 U.S. at 611-12.

powerfully supported by the legislative history, to which we turn in Part III.B.2 of our opinion.

The conclusion that this "reasonable factors other than age" exception textually precludes a disparate impact theory of liability under the ADEA is arguably strengthened by the Supreme Court's treatment of a similar exception to the Equal Pay Act. The Equal Pay Act was originally enacted in 1963 (as an amendment to the Fair Labor Standards Act) to prohibit discrimination in wages based on gender. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974). Under subsection (d), entitled "Prohibition of sex discrimination," in Title 29, section 206, the Equal Pay Act contains an exception similar to the "reasonable factors other than age" exception found in the ADEA:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex ... except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) *a differential based on any other factor other than sex: Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 U.S.C. § 206(d)(1) (emphasis added). The Supreme Court has interpreted this exception to preclude actions based on

disparate impact theories under the Equal Pay Act. *See County of Washington v. Gunther,* 452 U.S. 161, 169-71 (1981); *Los Angeles Dep't of Water & Power v. Manhart,* 435 U.S. 702, 710 (1978). For example, in *Manhart,* a class action was brought on behalf of female employees of the Los Angeles Department of Water and Power challenging the Department's requirement that female employees make larger contributions to its pension fund than male employees. 435 U.S. at 704. The requirement was based on a study of mortality tables which revealed that, on the average, the Department's female employees lived a few years longer than its male employees. *Id.* at 705. In footnote 20, Justice Stevens, writing for the Court, interpreted the "any factor other than sex" exception to the Equal Pay Act:

> A variation on the Department's fairness theme is the suggestion that a gender-neutral pension plan would itself violate Title VII because of its disproportionately heavy impact on male employees. *Cf. Griggs v. Duke Power Co.,* 401 U.S. 424. This suggestion has no force in the sex discrimination context because each retiree's total pension benefits are ultimately determined by his *actual life span*; any differential in benefits paid to men and women in the aggregate is thus "based on [a] factor other than sex," and consequently immune from challenge under the Equal Pay Act....

Id. at 710 n.20 (alteration in original).

The Court's willingness to find that the Equal Pay Act's "any factor other than sex" exception precludes disparate impact theories of liability under the Equal Pay Act is helpful to our statutory construction of the ADEA. Many provisions in the ADEA have their roots in the Fair Labor Standards Act and the Equal Pay Act. *See, e.g., Lorillard,*

434 U.S. at 577-82 (discussing the Fair Labor Standards Act as the "model" for the enforcement and remedial provisions to the ADEA). Although legislative history on § 623(f)(1) is slim, we find it likely that the ADEA's "reasonable factors other than age" exception was spawned from the Equal Pay Act's "any factor other than sex" exception, especially given that no parallel exception is found in Title VII.[11]

We recognize that the exceptions found in the ADEA and the Equal Pay Act are not identical. The most notable difference, emphasized by our colleague in dissent, is the inclusion of the word "reasonable" in the ADEA's exception. However, we, like the Eleventh Circuit in *Adams,* decline to infer from the inclusion of the word "reasonable" that Congress meant to create an implicit background rule that actions resulting in an age-disparate impact are as a general matter proscribed. *See* 255 F.3d at 1325 n.6. As we explained above, we believe the better reading is not that the clause acts as a limited defense against disparate impact claims but rather that the clause signals that impacts resulting from neutral criteria not directly dependent on age are not prohibited in the first place. At the very least, we recognize the "reasonable factors other than age" exception as a clear textual difference between the ADEA and Title VII regarding employer liability--a distinction that, if nothing else, plainly contradicts the argument that the cognizability of a disparate

---

[11] *See* Mack A. Player, *Wards Cove Packing or Not Wards Cove Packing? That Is Not the Question: Some Thoughts on Impact Analysis Under the Age Discrimination in Employment Act,* 31 U. RICH. L. REV. 819, 833-34 (1997) ("Note the similarity of the Equal Pay Act and ADEA 'factor other than ...' defenses. Guess the origins.... Until the mid-1970s the Secretary of Labor administered and enforced the Equal Pay Act. The Secretary of Labor was charged by Congress ... to prepare a report on age discrimination and recommend legislation to Congress. The initial drafts of what eventually became the ADEA were thus prepared by the Secretary of Labor.... It would seem, therefore, that the Secretary who was then enforcing the Equal Pay Act, lifted language and concept from the Equal Pay Act and placed it in the ADEA.").

impact claim under Title VII (as set forth in *Griggs*) controls the cognizability of a disparate impact claim under the ADEA.[12]

(2) Legislative History and Policy Considerations

In addition to the § 623(f)(1) exception to the ADEA, strong policy considerations, revealed in the legislative history of the ADEA, underscore the differences between the ADEA and Title VII. Because the broad remedial purpose behind Title VII was central to the Court's statutory construction of Title VII in *Griggs*, the difference between the purposes behind the ADEA and Title VII is directly relevant to whether a disparate impact theory is cognizable under the ADEA.

Congress enacted the ADEA after receiving a 1965 report by the Secretary of Labor regarding the problems of older workers. *See EEOC v. Wyoming*, 460 U.S. at 230-31.

[12] Before turning to the legislative history of the ADEA, we note that we do not share the dissent's view of the import of the Older Workers Benefit Protection Act, Pub.L. No. 101-433, 104 Stat. 978 (1990) ("OWBPA"). The OWBPA added a provision to the ADEA requiring employers in certain circumstances to provide laid off employees with data relating to the ages of employees who are laid off versus those who retain their jobs. *See* 29 U.S.C. § 626(f). According to the dissent, such statistics would have little use if the ADEA did not allow a disparate impact cause of action. We would not draw that inference, however, for such statistical evidence is quite useful in disparate treatment cases. *See Teamsters*, 431 U.S. at 339; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973); *Anderson v. Douglas & Lomason Co.*, 26 F.3d 1277, 1285 (5th Cir. 1994). Moreover, the legislative history of the OWBPA shows that Congress believed that such statistics would help to alert discharged employees to the possibility that they might have suffered disparate *treatment* based on age. *See* H.R. REP. NO. 101-664, at 22 (1990) (expressing the concern that in large-scale layoffs, "an individual employee would not reasonably be expected to know or suspect that age may have played a role in the employer's decision, or that the program may be designed to remove older workers from the labor force").

For our purposes, it is significant that the Secretary's report finds "no evidence of prejudice based on dislike or intolerance of the older worker" and concludes that the main problem older workers faced in the workplace was arbitrary age discrimination--namely explicit age limitations--based on misconceptions about the abilities of older workers. U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT 2, 6 (1965) (the "Report"), *reprinted in* EEOC, LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT 16 (1981) (hereinafter LEGISLATIVE HISTORY). The Report further specifically finds that the concept of age prejudice is unique and differs from the concept of race prejudice because the process of aging "is inescapable, affecting everyone who lives long enough," regardless of distinct social and economic environments. *Id.* at 6. The Report likewise distinguishes between "arbitrary discrimination" based on age and other institutional arrangements that have a disproportionate effect on older workers, finding that different solutions were appropriate for these different problems. *Id.* at 21-25; *see also Mullin*, 164 F.3d at 703 (describing the Report as "recommend[ing] that arbitrary discrimination be statutorily prohibited, but that systemic disadvantages incidentally afflicting older workers be addressed through educational programs and institutional restructuring").[13] These findings

[13] We recognize that the Report found that discriminatory practices were often "defended on grounds apparently different from their actual explanation." Report at 7. We disagree, however, with the dissent's conclusion that Congress therefore must have intended to create a cause of action for disparate impact. The practices to which the Report was referring were age limitations, a form of disparate treatment. *See id.* Age limitations were, in fact, the dominant form of arbitrary discrimination addressed in the Report. Such restrictions are "arbitrary," according to the Report, in that they are based on stereotype-driven assumptions about older workers rather than on older workers' actual abilities. *Id.* at 2, 8. When an employer's practices are motivated by neutral, non-age factors, however, "the problem of inaccurate and stigmatizing stereotypes

were "confirmed throughout the extensive factfinding undertaken by the Executive Branch and Congress" in conjunction with the enactment of the ADEA. *EEOC v. Wyoming*, 460 U.S. at 230-31.

On January 23, 1967, the Secretary transmitted to Congress proposed legislation entitled "Age Discrimination in Employment Act of 1967." Letter from W. Willard Wirtz to Hon. John W. McCormack and Hon. Hubert H. Humphrey, Jan. 23, 1967, *reprinted in* LEGISLATIVE HISTORY at 62-63. In this letter, the Secretary notes that the bill "provides for attention to be given to institutional arrangements which work to the disadvantage of older workers," but that "[r]easonable differentiations not based solely on age ... would not fall within the proscription" of the bill. *Id.* Instead, the Secretary recommended that "research ... be undertaken and promoted with a view to reducing barriers to the employment of older workers." *Id.* at 63. The Report, this proposed bill, and subsequent factfinding by the Executive Branch and Congress led Congress to limit the purpose of the ADEA specifically "to prohibit[ing] arbitrary age discrimination in employment." 29 U.S.C. § 621(b).

In contrast to the refined purpose evidenced in the historical underpinnings of the ADEA's enactment, the Supreme Court's opinion in *Griggs* discusses Title VII's broad *remedial* purpose. The defendant company in *Griggs* instituted a policy of permitting incumbent employees who lacked a high school education to qualify for transfer from the labor and coal handling department to an "inside" department by passing two tests of general intelligence--"[n]either [of which] was directed or intended to measure the ability to learn to perform a particular job or category of jobs." 401 U.S. at 427-28.. Prior to the effective date of Title VII, the defendant had instituted a policy of "restricting Negroes" to

---

disappears." *Hazen*, 507 U.S. at 611. The mischief identified in the Report is therefore more accurately targeted by a disparate treatment theory, not a disparate impact theory.

the labor and coal handling department in 1965. *Id.* at 427.

Chief Justice Burger, writing for the Court, held that Congress's objective in enacting Title VII was to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Id.* at 429-30. Based on this objective, the Court held that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* at 430.

The cornerstone of *Griggs* 's holding that disparate impact is cognizable under Title VII is thus the link between the history of educational discrimination on the basis of race and the use of that discrimination to continue to disadvantage individuals on the basis of their race. *Id.* at 432 (stating that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability"); *see also Gunther*, 452 U.S. at 178 (describing the "broad approach" of Title VII as aimed at "overcoming and undoing the effect of discrimination") (internal quotation marks omitted). However, absent from the scope of the ADEA are the historical and remedial concerns that, in the Title VII context, led to the recognition of disparate impact claims directed at overcoming the consequences of past societal discrimination.

As Justice Stevens explained in his concurring opinion in *Washington v. Davis*, 426 U.S. 229 (1976), it is "inappropriate simply to transplant ... standards in their entirety into a different statutory scheme having a different history." *Id.* at 255 (Stevens, J., concurring). We heed this advice today and therefore follow the majority of circuit courts to have addressed this issue in holding that a disparate impact theory of liability is not cognizable under the ADEA. We find insufficient textual support for the recognition of a disparate impact theory of liability in the ADEA. Further, as

we see it, the conclusion that the holding in *Griggs* should be extended to the ADEA context based on the similarities in the prohibitory sections of the ADEA and Title VII ignores important considerations. It ignores the existence of § 623(f)(1)--an express exclusion of employer liability that is present in the ADEA but not present in parallel form in Title VII--and it ignores the differing purposes behind the ADEA and Title VII.[14]

IV. THE PLAINTIFFS' DISPARATE TREATMENT CLAIM

In contrast to the plaintiffs' disparate impact claim,

---

[14] Although it was not essential to the Court's holding in *Hazen Paper Co.*, there is language in the opinion that supports our conclusion that a disparate impact claim is not cognizable under the ADEA. There, a discharged employee (who was 62) brought suit against his employers after they discharged him only a few weeks before his pension rights were to vest, contending that the employers' decision was motivated by his age. 507 U.S. at 606. The First Circuit affirmed the judgment for the plaintiff employee, entered by the district court consistent with the jury verdict in favor of the employee. *Id.* at 607. In so doing, the court of appeals gave "considerable emphasis" to the evidence of pension interference because, in the court of appeals's view, the jury could reasonably have found that age was inextricably intertwined with the decision to fire the employee before his pension rights vested. *Id.* The Supreme Court vacated this judgment. *Id.* at 617. Importantly, the employee did not base his claim for relief on a disparate impact theory of liability. *Id.* at 610. Nonetheless, in holding that "an employer does not violate the ADEA just by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service," *id.* at 613, the Court stated that "[d]isparate treatment ... captures the essence of what Congress sought to prohibit in the ADEA." *Id.* at 610. Further, the Court specifically discussed the decided purpose of the ADEA--i.e., to prevent "arbitrary" discrimination based on inaccurate stereotyping regarding older workers: "When the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is." *Id.* at 611 (emphasis omitted).

the plaintiffs' disparate treatment claim is cognizable under the ADEA.

A. McDonnell Douglas Framework

We have interpreted the now-familiar *McDonnell Douglas* framework to apply to disparate treatment claims brought under the ADEA. *Tyler v. Union Oil Co. of Cal.*, 304 F.3d 379, 395 (5th Cir.2002). To make out a prima facie case of discriminatory treatment based on age, the plaintiffs are required to prove: (1) they are within the protected class; (2) they are qualified for the position; (3) they suffered an adverse employment decision; and (4) they were replaced by someone younger or treated less favorably than similarly situated younger employees (i.e., suffered from disparate treatment because of membership in the protected class). *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 897 (5th Cir.2002); *see also Kelliher v. Veneman*, 313 F.3d 1270, 1275 (11th Cir.2002).

If the plaintiffs make out their prima facie case, then the burden of production shifts to the defendants to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Tyler*, 304 F.3d at 395. If the defendants meet this burden of production, the inference of discrimination drops, and the plaintiffs may then attempt to prove discrimination by offering evidence that the defendants' stated reason is pretextual. *Id.* ("In a disparate treatment case ... a plaintiff must produce sufficient evidence to rebut a showing by the employer that there was a legitimate, non-discriminatory reason for [differentially treating] a particular employee.").

Here, the district court dismissed the plaintiffs' disparate treatment claim because the plaintiffs could not make out their prima facie case based on the evidence available to them at the time their responsive briefing was filed. The district court cited this evidence as consisting of: (1) evidence that the Personnel Director for the City of

Jackson, Dr. George Terry, represented that the plan considered tenure only once; and (2) evidence that certain officers were subjected to age-related comments by Dr. Terry, Officer Deric Hearn, and Deputy Chief Cleon Butler. The district court additionally held that the plaintiffs' evidence, as a matter of law, was insufficient to disprove the defendants' legitimate nondiscriminatory reasons for their employment decision--to bring starting salaries for police officers up to the regional average, to develop a more generous pay scale within the confines of the city budget, and to consider tenure in the pay scale.

B. The Plaintiffs' Pending Motions

When the district court dismissed the plaintiffs' disparate treatment claim, two motions were pending: (1) a "motion for sanctions, a default judgment, attorneys' fees and expenses, expert witness fees and a continuance," filed by the plaintiffs on June 5, 2002; and (2) a "motion to strike exhibits to defendants' motion for summary judgment," filed by the plaintiffs on July 11, 2002.

The June 5, 2002, motion sought comparative wage data relating to the plan, as originally implemented in October 1998 and as revised in March 1999. It also sought to compel disclosure of any related fiscal and personnel discovery in accordance with the order of the magistrate judge granting the plaintiffs' motion to compel. Finally, the motion sought a continuance of the discovery period in order to allow the defendants to produce discovery materials previously requested and to allow the plaintiffs an opportunity to further develop their case based on this new evidence.

The July 11, 2002, motion sought to strike certain exhibits from the defendants' motion for summary judgment, in part because as to certain of these data produced as exhibits, "[t]he counsel for the Defendants [had] insisted that no such wage data existed," and "these data's purported existence and importance were never provided to the

Plaintiffs until it was utilized by an Expert for the Defense."

Curiously, the district court did not rule on these motions. Instead, in deciding to grant the defendants' motion for summary judgment, the district court simply considered the evidence available to the plaintiffs at the time of their responsive briefing. After granting summary judgment in favor of the defendants as to the plaintiffs' disparate treatment claim, the court then disposed of the plaintiffs' pending motions by stating that "[b]ecause the Court finds that Plaintiffs cannot meet their burden of proof for claims of disparate treatment under the ADEA, the other motions of Plaintiffs in opposition to the Motion of Defendant for Summary Judgment related to claims for disparate treatment are moot."

On appeal, the plaintiffs contend that the dismissal of their disparate treatment claim was premature because they "were not allowed to enforce their requests for discovery or to complete scheduled depositions that had been recessed when the plaintiffs learned that significant information had been willfully withheld from them."

C. Analysis of the District Court's Conclusions

The district court may have conflated the plaintiffs' burdens of production and persuasion in concluding that the plaintiffs failed to meet their burden of demonstrating a genuine fact issue regarding their disparate treatment claim.[15]

---

[15] For example, although not ultimately relevant to our determination on appeal, the district court required that the plaintiffs prove, as part of their initial prima facie burden, "unlawful motive" to discriminate because of age instead of requiring that the plaintiffs demonstrate replacement by someone younger or differential treatment of younger, similarly situated officers. *See Sandstad*, 309 F.3d at 897. The district court also appears to have used pre-*Reeves* case law in discussing the plaintiffs' ultimate burden of proving unlawful discrimination under the ADEA. *See, e.g., Ross v. Univ. of Tex. at San Antonio*, 139 F.3d 521, 525 (5th Cir.1998). As the Supreme Court stated in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000), "a plaintiff's prima facie case, combined with

However, we need not address this issue because, upon review, we agree with the plaintiffs that summary judgment on the plaintiffs' disparate treatment claim was premature in light of the plaintiffs' pending motions before the district court, particularly given the allegation included in these motions that the defendants have failed to comply with the order of the magistrate judge.

The magistrate judge clearly ordered the defendants to turn over various discovery documents, including documents that were responsive to the plaintiffs' initial disclosure request. These documents apparently include the working papers used by city officials in drafting the new and revised plans, as well as evidence regarding comparative wage data--including memoranda and other documentation related to the March 1, 1999, City of Jackson Pay Plan Revision, signed by all pertinent department heads, the existence of which was initially denied by the defendants. The plaintiffs allege that this evidence provides additional documentation verifying the extent of the disparity between wage increases for officers under the age of forty and officers over the age of forty. The plaintiffs also allege that this evidence provides them with documentation regarding the defendants' knowledge that, at least at the time the defendants revised the plan, the plan would result in inferior pay status for older workers when compared to younger workers. This evidence appears to us to be relevant to the plaintiffs' prima facie case and to their ultimate burden required to counter the defendants' proffered reasons for implementing the pay plan.[16] While much of this

---

sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." Further, the district court here apparently declined, without discussion, to consider any of the plaintiffs' evidence that the plan resulted in a disparity of four standard deviations between workers over forty and workers under forty. Such statistical evidence can be relevant to a claim of intentional discrimination. *See supra* note 12.

[16] Our ability to determine the degree to which this requested evidence will ultimately benefit the plaintiffs is made difficult by the absence in the

evidence relates primarily to the plaintiffs' now-dismissed disparate impact claim, the impact evidence may also support a permissible inference of intentional discrimination and, as the plaintiffs argue, may relate to whether one of the defendants' proffered justifications—to bring salaries up to the regional average—is false.

We do not decide whether the defendants have, in fact, failed to comply with the magistrate judge's order, whether the motion to continue discovery should be granted, or whether the plaintiffs' other pending motions have merit. Rather, we simply hold that the district court should have addressed these motions before it ruled, on an apparently incomplete summary judgment record, that the plaintiffs had not met their burden of demonstrating the existence of genuine fact issues regarding their disparate treatment claim. If the defendants did not comply with their discovery obligations such that the plaintiffs were prohibited from presenting their best case to the district court, summary judgment in favor of the defendants improperly denied the plaintiffs an opportunity to continue discovery and supplement the record. *Sunbelt Sav., FSB v. Montross,* 923 F.2d 353, 357, 358 (5th Cir.1991) (holding that summary judgment was premature when discovery was still pending).

The history of the discovery disputes plaguing this case and the existence of pending motions alleging that the plaintiffs' ability to present their best case was significantly hindered by the defendants' failure to comply with their discovery obligations convinces us that the summary judgment dismissal of the plaintiffs' disparate treatment claim was premature. On remand, the district court may want to take into account, in ruling on the pending motions, our decision on the viability of the disparate impact claim.

---

record of the parties' briefs in support of and against the defendants' motion for summary judgment and the failure of the plaintiffs to request that these briefs be supplemented to the record on appeal.

V. CONCLUSION

We AFFIRM in part, VACATE in part, and REMAND the case to the district court. Costs shall be borne by appellees.

STEWART, Circuit Judge, concurring in part, dissenting in part:

While I agree with the majority's disposition of plaintiff's disparate treatment claim in Part IV of the opinion, I also believe that the district court erred in improvidently dismissing the plaintiff's disparate impact claim and, therefore, I must dissent with regard to Part III.

This marks the first time our court has had to squarely decide, in the aftermath of *Hazen Paper v. Biggins,* 507 U.S. 604 (1993), whether a disparate impact claim may be formulated under the ADEA. I, however, am not thoroughly convinced by the majority's attempt to distinguish between two statutes--the ADEA and Title VII--whose text is virtually the same, that Congress meant to imply a disparate impact claim to the latter, but to preclude such a claim in the former. Equally, I am not persuaded by the majority's emphasis on the "reasonable factors other than age" ("RFOA") exception. When Congress enacted the ADEA in 1967, the courts had yet to develop a disparate impact theory. Thus, at the time of enactment, it appears that Congress most likely intended the RFOA to apply solely to claims of disparate treatment. Based upon a close reading of the text, the relevant legislative history, subsequent legislative actions, and concerns of public policy, I submit that a proper interpretation of the ADEA allows a disparate impact cause of action.

I. STATUTORY INTERPRETATION OF THE ADEA

The majority's analysis begins with the premise that the RFOA exception of the ADEA facially appears as a safe

harbor to employers. To the majority, the language of the RFOA exception clearly rejects the theory of disparate impact. The majority relies in part on a pre-*Hazen* dissent by Judge Easterbrook in *Metz v. Transit Mix, Inc.,* for the proposition that the RFOA exception is "*incomprehensible* unless the prohibition forbids disparate treatment and the exception authorizes disparate impact." 828 F.2d 1202, 1220 (7th Cir.1987) (emphasis added).

Contrary to the majority's conclusion, it is not at all clear from the text that the RFOA exception *has no alternative interpretation* other than to preclude disparate impact. The RFOA exception aside, the language of the ADEA and Title VII are similar in every other respect. Thus, I cannot conclude, in the absence of expressed language to the contrary, that Congress meant to apply the disparate impact theory to Title VII, but not to the analogous language of the ADEA. Until the United States Supreme Court expressly rules on this issue, I continue to believe that the majority viewpoint is in error. Despite the obvious similarities between Title VII and the ADEA, today's majority joins our fellow courts of the First,[1] Third,[2] Sixth,[3] Seventh,[4] Tenth,[5] and Eleventh[6] Circuits in disclaiming a disparate impact theory under the ADEA.

---

[1] *Mullin v. Raytheon Co.,* 164 F.3d 696, 702-04 (1st Cir.1999) *cert. denied,* 528 U.S. 811 (1999).

[2] *DiBiase v. SmithKline Beecham Corp.,* 48 F.3d 719, 732 (3d Cir.1995).

[3] *Lyon v. Ohio Educ. Ass'n and Prof'l Staff Union,* 53 F.3d 135, 139 n.5 (6th Cir.1995).

[4] *EEOC v. Francis W. Parker School,* 41 F.3d 1073, 1076-77 (7th Cir.1994).

[5] *Ellis v. United Airlines, Inc.,* 73 F.3d 999, 1006-07 (10th Cir.1996).

[6] *Adams v. Fla. Power Corp.,* 255 F.3d 1322, 1325 (11th Cir.2001).

As shown through persuasive precedent from other circuits, however, there is another side to this debate. For example, while acknowledging that post- *Hazen* the availability of disparate impact claims under the ADEA is unsettled among the circuits, the Second Circuit held that it "generally assesses claims brought under the ADEA identically to those brought pursuant to Title VII, including disparate impact." *Smith v. Xerox,* 196 F.3d 358, 367 n.5 (2d Cir.1999). The Second Circuit is not alone. The Eighth Circuit has also stated that it "continues to recognize the viability of ... [ADEA disparate impact] claims." *Lewis v. Aerospace Cmty. Credit Union,* 114 F.3d 745, 750 (8th Cir.1997); *See also EEOC v. McDonnell Douglas Corp.,* 191 F.3d 948, 950 (8th Cir.1999) (stating that "the law of this circuit is that disparate impact claims are cognizable under the ADEA"). Thus, precedent from other circuits show that a contrary facial interpretation of the RFOA is reasonable.

Moreover, the strongest argument against the language of the RFOA exception precluding disparate impact lies in the substantive provisions of the ADEA and Title VII. In a similar case, a concurrence by Eleventh Circuit Judge Barkett acutely noted:

> [I]n every statutory discrimination case, a decision based upon legitimate business necessity will never support a claim for liability. *Griggs* itself recognized and repeatedly emphasized that disparate impact is a basis for relief only if the practice in question is not founded on "business necessity," or lacks "a manifest relationship to the employment." [401 U.S. 424, 430-31 (1971)]. [The RFOA exception] of the ADEA adds nothing new.
>
> ... In light of the parallels between the substantive provisions of the ADEA and Title VII, and in light of the fact that Congress has amended the ADEA several times but has never explicitly excluded disparate impact claims, a reasonable interpretation of the [RFOA exception] is that it codifies the business necessity exception to disparate impact claims.

Adams, 255 F.3d at 1327-28 (Barkett, J., concurring).

I find Judge Barkett's reasoning fully persuasive. Under a theory of disparate impact, employers will still be able to have employment practices and policies that may burden over-age workers in a disproportionate way. These practices will be permissible, despite the disproportionate impact, provided the employer shows they are supported by a business necessity. Upon proving business necessity, the burden shifts to the employee to show that the practice in question was established not because of the legitimacy of the necessity, but merely as a pretext for invidious stereotyping. Therefore, I am not persuaded that adopting a disparate impact theory will lead to any inconsistencies with the RFOA exception.

That said, the cornerstone of the majority's holding relies on an analogous provision in the Equal Pay Act ("EPA"). Because the RFOA exception does not exist under Title VII, the majority looks instead to the EPA, which precludes disparate impact claims via its "any factor other than sex" language. The majority attempts to show that the similarities between the RFOA and EPA "any factor" exception should be construed by courts to demonstrate that the RFOA should similarly prohibit disparate impact. *See Washington v. Gunther,* 452 U.S. 161, 170 (1981) (juxtaposing the EPA's "any factor other than sex" language with Title VII's broadly inclusive prohibition against gender discrimination and stating that the language "confine[d] the application of the Act to wage differentials attributable to sex discrimination.").

The flaw in the majority's logic is that the terms "any" and "reasonable" are not synonymous. Under the ADEA, an employer with a disparate impact policy may be liable for age discrimination if factors relied on were not reasonable. Pursuant to the EPA, however, if an employment policy causes wage differences among men and women workers, the employer will not be liable unless the policy in question was based solely on gender. Thus, the ADEA and EPA exceptions cannot be read to have the same meaning unless the word "reasonable" is omitted from the RFOA exception. In this light, the premise of the majority opinion appears little more than ironic in that when it compares statutory language of the ADEA and Title VII to preclude disparate impact, the court advocates a dissimilar reading of almost identical statutes. Yet, when comparing the ADEA to the EPA, with the intent of precluding disparate impact, the majority applies a similar reading of exceptions which differ significantly. I disagree with the majority's analytical approach and its reading of *Gunther* as indicating that the ADEA cannot bar some "reasonable factors other than age" practices which have a disparate impact on workers over forty.

Additionally, the majority's contention that the ADEA and Title VII are not similar statutes, insofar as their application of the disparate impact theory, disregards the doctrine of *in pari materia*. It has long been held that judicial interpretations of one statute may be informed by interpretations of similar statutes. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) ("[When] Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."). Under this well established statutory canon, "the interpretation of one statute may be influenced by language of other statutes which are not specifically related, but which apply to similar persons, things, or relationships." *Nat. Fed'n of Fed. Employees v. Dep't. of Interior*, 526 U.S.

86 (1999) (defining the doctrine of *in pari materia*, citing several cases where the Court applied this doctrine to aid in its construction of a variety of statutes, and arguing that the doctrine was now "well established") *on remand*, 174 F.3d 393 (4th Cir.1999).

In the context of the ADEA and Title VII, adhering to this canon is particularly well suited because, as the majority concedes, the ADEA grew out of debates on Title VII. Furthermore, *in pari materia* has relevance because both aforementioned statutes apply to similar persons (here, the employees) and similar relationships (here, the employment context). Moreover, Congress carefully chose identical language for its statutes dealing with both discrimination against older workers and discrimination against those due to race or gender. Therefore, the majority should have applied the doctrine of *in pari materia* and interpreted the disparate impact theory as applicable to the ADEA.

II. THE ADEA LEGISLATIVE HISTORY

My second point of disagreement with the majority concerns its portrayal of the legislative history of the ADEA. The majority opinion subtly recognizes that the legislative history of the ADEA is not directly on point. Although the majority's opinion properly recognizes that the Supreme Court's 1971 endorsement of the disparate impact theory in *Griggs*, 401 U.S. at 430- 31, was later in time than Congress's enactment of the ADEA in 1967, the majority attempts to support its position by focusing on the underlying purposes of the legislation.

Although the language of Title VII and the ADEA are almost identical, the majority essentially dismisses *Griggs* as irrelevant to the calculus of age discrimination. The majority distinguishes *Griggs* from the ADEA on the grounds that *Griggs* interpreted Congress's intent underlying Title VII as sweeping in nature. The majority argues, "[i]n contrast to the refined purpose evidenced in the historical underpinnings to

the ADEA's enactment, the Supreme Court's opinion in *Griggs* discusses Title VII's broad remedial purpose." While it is undoubtably true that *Griggs* recognized disparate impact theory as an available tool in the employment discrimination toolbox to remedy past discrimination under Title VII, it does not necessarily follow, as the majority asserts, that the disparate impact tool is available only in a remedial context.

I disagree in two respects with the majority's holding that disparate impact theory should be limited to the context of Title VII. First, the textual similarity between Title VII and the ADEA evinces a congressional intent to provide similar protection against employment discrimination under the two statutes. Second, it is arguable whether historical discrimination should be a necessary precondition for recognizing a disparate impact theory. I acknowledge, as the majority does, that the ADEA and Title VII are distinct because the former lacks a history tied to past discrimination. In the absence of a clear statement to the contrary, however, I cannot assume that Congress intended to limit the remedial measures available under anti-discrimination statutes with almost identical language merely because the statutes arose out of distinct historical contexts. The Supreme Court in *Griggs*, for example, did not posit historical discrimination as the sole reason for disparate impact under Title VII; *Griggs* merely held that a showing of disparate impact was available to remedy this type of discrimination. *See* Jennifer J. Clemons and Richard A. Bales, *ADEA Disparate Impact in the Sixth Circuit*, 27 Ohio N.U. L. Rev. 1, 23 (2000). Moreover, the majority's emphasis on the historical posture of the ADEA and Title VII unduly minimizes the statutes shared aim of ridding from the workplace an environment of *concealed* discrimination. *Griggs*, 401 U.S. at 431 (stating that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation"); *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983) (stating that the ADEA seeks to remedy "arbitrary" forms of age discrimination "based in large part on stereotypes

unsupported by objective facts, and often defended on grounds different from its actual causes"). Consistent with such an aim, a disparate impact theory may be a plaintiff's only tool in counteracting sophisticated discrimination. Therefore, due to the similarity of the ADEA and Title VII language, it is my view that the protection available under both statutes, including that from disparate impact, should also be similar.

The majority ignores the fact that *Griggs* does not stand alone as the only relevant decision applying disparate impact theory. Under Supreme Court precedent, the disparate impact theory has grown beyond its original purpose of alleviating racial discrimination claims. *See Dothard v. Rawlinson*, 433 U.S. 321, 329-32 (1977) (applying disparate impact theory to Title VII sex discrimination claims). Furthermore, under the 1991 Civil Rights Act, 42 U.S.C. § 2000-e2(k)(1)(A)(I) (1994), disparate impact claims are readily available not only to plaintiffs alleging racial discrimination, but also to those claiming discrimination on the basis of gender, national origin, and religion.[7] In light of these developments, I cannot agree with the majority that the ADEA must be limited solely to disparate treatment claims.

I also do not agree with the majority's interpretation

---

[7] Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, provides in pertinent part:

> Sec. 703. (k)(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if--
>
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity;
>
> ....

42 U.S.C. § 2000e-2 (2003).

of the most prominent documentation of all ADEA legislative history, the Wirtz Report.[8] The majority uses the Report to bolster its argument that the ADEA was not premised on eradicating past discrimination. The flaw with the majority's use of this most critical evidence of congressional intent is its failure to acknowledge the argument, embodied within the Wirtz Report, that age discrimination was in fact "based in large part on stereotypes unsupported by objective fact, and was often defended on grounds different from its actual cause." *See EEOC*, 460 U.S. at 231. The aforementioned conclusion seems to indicate that the ADEA's purpose may not have been limited to eradicating animus, as the majority suggests. Rather, and in contrast to the majority's view, the Wirtz Report indicates that Congress merely intended to utilize the ADEA to eliminate stereotypes that workers' productivity declines with age. That said, I acknowledge that the Wirtz Report is supportive evidence of Congress's intent concerning the ADEA and that the Report did in fact distinguish age discrimination as "rarely based on the sort of animus motivating some other forms of discrimination." My position merely suggests that because the Wirtz Report sheds the best light on Congress's intent in enacting the ADEA, a point the majority does not refute, this Report arguably provides more support for affirming, rather than denying, that the ADEA contains a disparate impact cause of action.

Furthermore, the legislative intent indicating that Congress meant to allow the disparate impact theory in ADEA actions may be discerned from a Congressional

---

[8] The term "Wirtz Report" refers to a congressional report commissioned by the former Department of Labor Secretary W. Willard Wirtz which, pursuant to section 715 of Title VII, instructed the Secretary of Labor to conduct a study with recommendations for "legislation to prevent arbitrary discrimination in employment because of age." The origins of the ADEA's rationales and objectives can be traced to the resulting report entitled, *The Older American Worker: Age Discrimination in Employment* (1965). *See also EEOC*, 460 U.S. at 229-31 (tracing legislative history of the ADEA and central role of the Secretary of Labor Report).

amendment. In 1994, Congress amended the ADEA by adding the Older Workers Benefit Protection Act ("OWBPA"). 29 U.S.C. §§ 623, 626, 630(f) (1994). The statute requires an employer to provide the employee with information regarding the ages of workers offered severance pay and those who were not let go before the employee waives any potential discrimination claims. 29 U.S.C. § 626(f)(1)(E)-(G), (H)(ii) (1994). These statistics, comparing the ages of those terminated and those retained, would be of little relevance if the employee could not bring a disparate impact claim. Therefore, the addition of the OWBPA is additional evidence that the disparate impact theory should be available under the ADEA.

III. CONCLUSION

The majority today fails to heed the *Griggs* recognition that in a complex society, not all discrimination is apparent or overt. Often, such discrimination will be subtle and concealed. The practical consequence of the majority's decision is that it will allow an employer to exclude older workers from lower-level jobs simply on the basis of pretext, without an additional tool at the employee's disposal to counteract such sophisticated discriminatory acts. Contrary to the majority's stance, I agree with the Supreme Court's determination in *Hazen* that the disparate impact liability was designed to detect employment decisions that reflect "inaccurate and stigmatizing stereotypes." 507 U.S. at 610. Thus, I find no incompatibility with using disparate impact theory to prove liability under the ADEA.

Instead, I am concerned that by not allowing a disparate impact cause of action under the ADEA, the majority has essentially held such plaintiffs to the heightened evidentiary standard of *Washington v. Davis*, 426 U.S. 229 (1976), where sophisticated and concealed discrimination must be proved solely through intentional acts. The majority, however, fails to fully absorb the spirit of Justice Stevens's

concurrence in *Davis* that "the line between purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the court's opinion may assume." *Id.* at 254. Applied to our context, Justice Stevens's concurrence demonstrates that the majority's opinion, which distinguishes between intentional discrimination based on disparate treatment on the one hand and a disparate impact cause of action absent proof of intent on the other, may not be as clear as the majority seems to opine. Therefore, with regards to Part III of the majority opinion, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

Civil Action No. 3:01-CV-367BN

AZEL P. SMITH, ET AL., PLAINTIFF

v.

CITY OF JACKSON, MISSISSIPPI, ET AL., DEFENDANT

Filed: Sept. 6, 2002

OPINION AND ORDER

This cause is before the Court on the Motion of Defendant for Summary Judgment. Having considered the Motion, Response, Rebuttal, attachments to each, and supporting and opposing authority, the Court finds that the Motion is well taken and should be granted.

I. BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs are police officers for the City of Jackson, Mississippi, ("the City") all of whom are 40 years of age or older. On October 1, 1998, the City adopted a pay plan granting raises to all city employees. The City revised that pay plan on March 1, 1999, as to employees of the Police and Fire Departments. The revised pay plan granted raises to all police officers and police dispatchers. However, those officers and dispatchers with five years or less tenure with the department received proportionately greater raises when

compared to their former pay than those with more than five years tenure. The plan accordingly created three categories for the purpose of the analysis of this case: 1) those officers and dispatchers with less than five years of tenure, most, if not all, of whom would have been under 40 years of age; 2) those 40 years of age or older, most, if not all, of whom would have had more than five years of tenure, and; 3) those under 40 years of age with more than five years of tenure. The issue presented by this case is whether such a plan based directly on tenure as opposed to age violates the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §. 6.21 et seq.

Plaintiffs make two claims of discrimination under the ADEA. The first claims intentional discrimination, or disparate treatment. The second claims unintentional discrimination, or disparate impact.

Defendant filed this motion for summary judgment on both claims. Regarding the claim of disparate treatment, Defendant argues (1) that Plaintiffs cannot make a prima facie case to shift the burden to Defendants, and (2) even if Plaintiffs could make a prima facie case, Defendant had a legitimate, non-discriminatory, market-driven rationale for the pay plan. Regarding the claim of disparate impact, Defendant argues (1) that such a claim is not cognizable under the ADEA, (2) even if such claim is cognizable, Plaintiffs cannot make out a prima facie case, and (3) even if Plaintiffs could make a prima facie case, Defendant had a legitimate, non-discriminatory, market-driven rationale for the pay plan.

Regarding their claim of disparate treatment, Plaintiffs argue that summary judgment is inappropriate for several reasons.[1] First, there has not been an opportunity for

[1] Plaintiffs have filed additional motions to support their opposition to summary judgment, including a Motion in Limine to Strike Portions of Defendants' Expert Witnesses' Reports and Testimony, and a Motion for Sanctions, a Default Judgment, Attorneys' Fees and Expenses, Expert Witness Fees and a Continuance, and a Motion to Strike Exhibits to Defendants' Motion for Summary Judgment.

adequate discovery. Second, Defendant has failed to meets its burden of establishing that there are no genuine issues of material fact. Third, summary judgment is inappropriate where a rational fact finder could conclude that the employer's action was discriminatory. Fourth, Plaintiffs argue that the Defendant had knowledge that the pay plan considered length of tenure. Plaintiffs argue that such knowledge creates a jury question regarding Defendant's intent. Fifth, Plaintiffs argue that Defendant used terms indicated age-based bias, and that such use defeats summary judgment.

Regarding their claims of disparate impact, Plaintiffs argue that summary judgment is also inappropriate. First, statistical evidence indicating a disparate impact on Plaintiffs creates a jury question. Second, Fifth Circuit precedent recognizes claims for disparate impact under the ADEA.

The material facts are not in dispute.[2] Both sides agree that the City implemented a pay plan that increased police salaries. Both sides agree that all police officers received some level of pay increase. Both sides agree that some younger officers received higher raises than some older officers, when viewed as a percentage of previous salary.

II. LEGAL STANDARD

Rule 56 of the Federal Rules of Civil Procedure provides, in relevant part, that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

[2] Plaintiffs argue that the date of implementation of the pay plan is in dispute. Testimony varies as to whether the plan was implemented in October of 1998 and amended in March of 1999, or whether it was first implemented in March of 1999. The Court finds this distinction to be immaterial to determining whether Plaintiffs' claims may go forward.

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(C). The United States Supreme Court has held that this language "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Moore v. Mississippi Valley State Univ.*, 871 F.2d 545, 549 (5th Cir. 1989); *Washington v. Armstrong World Indus.*, 839 F.2d 1121, 1122 (5th Cir. 1988).

The party moving for summary judgment bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record in the case which it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The movant need not, however, support the motion with materials that negate the opponent's claim. *Id.* As to issues on which the non-moving party has the burden of proof at trial, the moving party need only point to portions of the record that demonstrate an absence of evidence to support the non-moving party's claim. *Id.* at 323-24. The non-moving party must then go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." *Id.* at 324.

Summary judgment can be granted only if everything in the record demonstrates that no genuine issue of material fact exists. It is improper for the district court to "resolve factual disputes by weighing conflicting evidence, . . . since it is the province of the jury to assess the probative value of the evidence." *Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 892 (5th Cir. 1980). Summary judgment is also improper where the court merely believes it unlikely that the non-moving party will prevail at trial. *National Screen*

Serv. Corp. v. Poster Exchange, Inc., 305 F.2d 647, 651 (5th Cir. 1962).

III. ANALYSIS

A. Disparate Treatment

In order to make a prima facie case of discrimination under the ADEA, Plaintiffs must demonstrate that they are members of the protected class, that they suffered an adverse employment decision, and that the adverse decision was motivated by unlawful age discrimination. *Ross v. University of Texas at San Antonio*, 139 F.3d 521, 525 (5th Cir. 1998). Here, the Plaintiffs are all members of the protected class. For the purpose of deciding this Motion for Summary Judgment, the Court assumes arguendo that Plaintiffs' evidence is sufficient to demonstrate that Plaintiffs suffered an adverse employment decision.

Even so, Plaintiffs fail to demonstrate that the City was motivated by unlawful age discrimination. Plaintiffs proffer two pieces of evidence in favor of a finding of age discrimination. First, Plaintiffs point to comments made by Dr. George Terry, who was the Personnel Director for the City of Jackson at the time. Dr. Terry's comments came at an employee grievance hearing held on May 20, 1999. Several of the Plaintiffs were allegedly present at the hearing. According to Plaintiffs, the following exchange took place between Dr. Terry and an unidentified police officer:

> OFFICER??: Let me ask you a question, the pay plan shows that you didn't even consider longevity on the department [inaudible] What does longevity mean for the department [inaudible]
>
> TERRY: I think the only response that I can make to that is that the pay plan considered tenure only

> once. Five years or less and more than five years. There was no other consideration for, for, for tenure.

Plaintiffs' Response in Opposition to the Defendants' Motion for Summary Judgment, Exhibit B.

Dr. Terry's comments merely demonstrate that the City knowingly considered length of service as a factor in its pay plan-Consideration of length of service is not the same as consideration of age. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993). Rather, "an employee's age is analytically distinct from his years of service.... [Therefore] an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily 'age based.'" *Hazen Paper*, 507 U.S. at 611. *See also Williams v. General Motors Corp.*, 656 F.2d 120, 130 n.17 (5th Cir. 1981) ("seniority and age discrimination are unrelated. The ADEA targets discrimination against employees who fall within a protected age category, not employees who have attained a given seniority status.... We state without equivocation that the seniority a given plaintiff has accumulated entitles him to no better or worse treatment in an age discrimination suit"). Thus, Dr. Terry's comments are not enough for Plaintiffs to demonstrate an unlawful motive on the part of the City.

The second piece of evidence on which Plaintiffs rely is the Supplemental Combined Responses of All Plaintiffs to Defendants' First Combined Interrogatories and Request for Production of Documents. Defendants' Motion for Summary Judgment, Exhibit 9. Therein, several Plaintiffs provide a response to an Interrogatory from Defendant asking for the nature and details of each alleged act of intentional discrimination against them. Several plaintiffs claim to have been subjected to comments relating to their age, but fail to attribute such comments to Defendant. The only individuals to whom comments are attributable are Dr.

Terry, Officer Deric Hearn, and Deputy Chief Cleon Butler. Because neither Officer Hearn, Deputy Chief Butler, nor any other police officer played any role as a decision-maker with regard to the implementation of the pay plan, any comments made by them are irrelevant to this matter. *See Wyvill v. United Companies Life Ins. Co.*, 212 F.3d 296, 304 n.5 (5th Cir. 2000).

Additionally, "[i]n order for an age-based comment to be probative of an employer's discriminatory intent, it must be direct and unambiguous, allowing a reasonable jury to conclude without any inferences or presumptions that age was a determinative factor in the decision to terminate the employee." *Wyvill*, 212 F.3d.at 304. None of the comments attributable to any individual here satisfies this test. Thus, the Plaintiffs' Combined Responses do not demonstrate an unlawful motive on the part of the City.

Even if Plaintiffs could produce enough evidence of unlawful motive by the City, that would only serve to shift the burden to the City to demonstrate a "legitimate non-discriminatory reason for the employment decision." *Ross*, 139 F.3d at 125. Here, the City has demonstrated such a reason: to bring starting salaries for police officers up to the regional average, to develop a more generous pay scale within the confines of the city budget, and to consider tenure as one factor in the pay scale. Once such a non-discriminatory reason is demonstrated, the burden shifts back to Plaintiffs. *Ross*, 139 F.3d at 525.

Thus, the "plaintiff is left with the ultimate burden of presenting evidence from which a reasonable trier of fact could infer age discrimination. *Ross*, 139 F.3d at 525. To do so, Plaintiff must present evidence that " (1) rebuts the employer's non-discriminatory reason, and (2) creates an inference that age was a determinative factor in the challenged employment decision." *Id.* Here, Plaintiffs have presented no such evidence. Thus, Plaintiffs cannot maintain their burden.

Because the Court finds that Plaintiffs cannot meet their burden of proof for claims of disparate treatment under the ADEA, the other motions of Plaintiff in opposition to the Motion of Defendant for Summary Judgment related to claims for disparate treatment are moot. Accordingly, the Motion for Summary Judgment of Defendant is granted with respect to Plaintiffs' claims of disparate treatment under the ADEA.

B. Disparate Impact

Plaintiffs claim that even in the absence of evidence of intent, their claims for disparate impact should survive summary judgment. To the extent that claims of discrimination by disparate impact exist, no discriminatory motive need by proved. *Hazen Paper*, 507 U.S. at 609. Instead, it is sufficient to demonstrate that facially neutral employment practices impact a protected group more harshly than other groups. *Id.*

The United States Supreme Court has "never decided whether a disparate impact theory of liability is available under the ADEA." *Hazen Paper*, 507 U.S. at 610. The Circuit Courts that have considered the issue are split. To this point, four circuits have expressly held that the ADEA does not allow for claims of disparate impact.[3] Two circuits have withheld so holding, but have stated strong doubts as to whether the ADEA allows for claims of disparate impact.[4] Three circuits

[3] *Mullin v. Raytheon Co.*, 164 F.3d 696 (1st Cir.1999), cert. denied, 528 U.S. 811 (1999); *E.E.O.C. v. Francis W. Parker School*, 41 F.3d 1073 (7th Cir. 1994), cert. denied, 515 U.S. 1142 (1995); *Ellis v. United Airlines*, 73 F.3d 999 (10th Cir. 1996), cert. denied 517 U.S. 1245 (1996); *Adams v. Florida Power Corp.*, 255 F.3d 1322 (11th Cir. 2001), cert. granted 122 S. Ct. 643, 151 L.Ed.2d 561 (2001), cert. dismissed as improvidently granted 122 S.Ct. 1290, 152 L.Ed.2d 345 (2002).

[4] *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719 (3d Cir. 1995), cert. denied 516 U.S. 916 (1995); *Lvon v. Ohio Educ. Ass'n and Prof'l Staff Union*, 53 F.3d 135 (6th Cir. 1995).

have held that the ADEA does allow for claims of disparate impact.[5] The Fifth Circuit Court of Appeals has not addressed the issue.[6]

This Court agrees that the ADEA does not allow for claims of disparate impact. The text of the ADEA provides that "an employer may 'take any action otherwise prohibited...where the differentiation is based on reasonable factors other than age.'" *Adams v. Florida Power Corp.*, 255 F.3d 1322, 1325 (11th Cir. 2001) (quoting 29 U.S.C. § 623 (1)(1)). Several courts have noted that this language seems to eliminate the possibility of a disparate impact claim. *See, e.g., Adams*, 255 F.3d at 1325; *Mullin*, 164 F.3d at 702. Additionally, although the Supreme Court did not answer the question in *Hazen Paper*, language therein strongly suggests that no disparate impact claim should lie in cases such as this one. As the Eleventh Circuit states:

> First, the Court noted that "[d] isparate treatment... captures the essence of what Congress sought to prohibit in the ADEA." *Hazen*, 507 U.S. at 610, 113 S.Ct. at 1706. In addition, the Court reiterated that, in making employment decisions, the use of factors correlated with age, such as pension status, did not rely on "inaccurate and stigmatizing stereotypes" and was acceptable. *Id.* at 611, 113 S. Ct. at

[5] *Criley v. Delta Airlines*, 119 F.3d 102 (2d Cir. 1997), cert. denied 522 U.S. 1028 (1997); *Lewis v. Aerospace Cmt. Credit Union*, 114 F.3d 745 (8th Cir. 1997), cert. denied 523 U.S. 1062 (1998); *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000), cert. denied 532 U.S. 914 (2001).

[6] Plaintiffs cite several cases within the Fifth Circuit for the proposition that "the district courts have uniformly applied the disparate impact analysis to age discrimination cases." Memorandum in Opposition to Defendants' Motion for Summary Judgment, p. 10. The Court points out that the district court cases cited are not controlling. However, the Court also finds that none of the cited cases is directly on point.

> 1706-07. That position is inconsistent with the viability of a disparate impact theory of liability, which requires no demonstration of intent, but relies instead on the very correlation between the factor used and the age of those employees harmed by the employment decision to prove liability.

Adams, 255 F.3d at 1326 (quoting *Hazen Paper*, 507 U.S. 604 (1993)).

Because the Court finds that the ADEA does not allow for claims of disparate impact, the other motions of Plaintiff in opposition to the Motion of Defendant for Summary Judgment related to claims for disparate impact are moot. Accordingly, the Motion for Summary Judgment of Defendant is granted with respect to Plaintiffs' claims of disparate impact under the ADEA.

IV. CONCLUSION

IT IS THEREFORE ORDERED that the Motion of Defendant for Summary Judgment is hereby granted in its entirety. A separate Final Judgment will be entered this day.

IT IS FURTHER ORDERED that the following Motions of Plaintiff are moot and, accordingly, are denied: (1) Motion in Limine to Strike Portions of Defendants' Expert Witnesses' Reports and Testimony, (2) Motion for Sanctions, a Default Judgment, Attorneys' Fees *and* Expenses, Expert Witness Fees and a Continuance, and (3) Motion to Strike Exhibits to Defendants' Motion for Summary Judgment.

SO ORDERED this the 6th day of September, 2002.

/s/ William Barbour
WILLIAM BARBOUR
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

Civil Action No. 3:01-CV-367BN

AZEL P. SMITH, ET AL., PLAINTIFF

v.

CITY OF JACKSON, MISSISSIPPI, ET AL., DEFENDANT

Filed: Sept. 6, 2002

FINAL JUDGMENT

In accordance with the Opinion and Order entered this day granting the Motion of Defendant for Summary Judgment, this cause is hereby dismissed with prejudice.

SO ORDERED this the 6th day of September, 2002.

/s/ William Barbour
WILLIAM BARBOUR
UNITED STATES
DISTRICT JUDGE